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# “Hands Up, Don’t Shoot”: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness

by ZACH NEWMAN\*

For our civilized world is nothing but a masquerade.

- Arthur Schopenhauer, 1851

When people come to believe that a system offers them  
nothing, they have nothing to lose by burning it down.

- Erwin Chemerinsky, 1993

Every time you see me, you want to mess with me.

- Eric Garner, 2014

And we hate po-po, wanna kill us dead in the street for  
sure.

- Kendrick Lamar, 2015

## I. Introduction: The Fire This Time

On August 9, 2014, Michael Brown, a black, unarmed eighteen-year-old, was shot to death by a white police officer, Darren Wilson, in Ferguson, Missouri.<sup>1</sup> His body was left decomposing in the street for four hours, face down, on a hot summer day.<sup>2</sup> The month before,

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\* J.D. Candidate 2016, University of California, Hastings College of the Law. I would like to thank the entire editing staff of the *Hastings Constitutional Law Quarterly*. This note is in solidarity with all the struggles to end police violence and is dedicated to all of the victims of police violence, may they endure and rest in power.

1. Elizabeth Chuck, *The Killing of an Unarmed Teen: What We Know About Brown’s Death*, NBC NEWS (Aug. 13, 2014, 5:03 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/killing-unarmed-teen-what-we-know-about-browns-death-n178696>.

2. Amy Davidson, *Michael Brown’s Body*, THE NEW YORKER (Aug. 19, 2014), <http://www.newyorker.com/news/amy-davidson/michael-browns-body>. See also Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson*

on July 17, Eric Garner, an asthmatic, forty-three-year-old black man, died after a white NYPD officer placed him in a chokehold.<sup>3</sup> Freddie Gray; Walter Scott; Sam DuBose; Mansur Ball-Bey; Sandra Bland.<sup>4</sup> Their deaths are deaths on a long arc of violence perpetrated by white police officers, vigilantes, and mobs are points on a long arc that stretches from the trans-Atlantic slave trade; through reconstruction and Jim Crow, institutionalized de jure segregation, the civil rights movement, the rise of neoliberalism, the prison industrial complex and the “New Jim Crow”; and into the present, where the contemporary legal system continues to legally permit the taking of black lives.<sup>5</sup> “Black Lives Matter” is the chant because everything in

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*Street*, N.Y. TIMES (Aug. 23, 2014), <http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>; TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 11 (2015) (“That was the week you learned that the killers of Michael Brown would go free. The men who had left his body in the street like some awesome declaration of their inviolable power would never be punished.”).

3. *Eric Garner Death: US Orders Civil Rights Inquiry*, BBC (Dec. 4, 2014), <http://www.bbc.com/news/world-us-canada-30323750>.

4. Ashley Fantz & Greg Botelho, *What We Know, Don't Know About Freddie Gray's Death*, CNN (Apr. 29, 2015), <http://www.cnn.com/2015/04/22/us/baltimore-freddie-gray-what-we-know/>; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), [http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?\\_r=0](http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0); *Will Prosecutors Charge Officers Who Lied to Protect Ray Tensing After He Fatally Shot Sam DuBose?*, DEMOCRACY NOW! (July 31, 2015), [http://www.democracynow.org/2015/7/31/will\\_prosecutors\\_charge\\_officers\\_who\\_lied](http://www.democracynow.org/2015/7/31/will_prosecutors_charge_officers_who_lied); Carey Gillam, *Black Teen Killed by St. Louis Police Shot in Back*, REUTERS (Aug. 21, 2015, 6:34 PM), <http://news.yahoo.com/black-teen-killed-st-louis-police-shot-back-143235453.html>; Dana Ford, *DA: Sandra Bland's Death Being Treated Like Murder Investigation*, CNN (July 21, 2015), <http://www.cnn.com/2015/07/20/us/texas-sandra-bland-jail-death/>.

5. Generally speaking, it is critical to connect contemporary events to history so as to better understand their significance and to note and recognize patterns and trends of racism and racist acts. At the very least, linking the present to the past indicates which bodies have been considered killable, ungrievable, and dispensable in the past, and which continue to be, throughout different legal, social, and cultural moments. In addition, many of these terms, such as “prison industrial complex” and “New Jim Crow,” are politicized concepts and frameworks for making sense of the world and police violence. Part II of this note will explore these concepts in depth. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2011); Eric A. Stanley, *Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* (Eric A. Stanley & Nat Smith, eds., 2011). See also James M. Durant III, *Equal Protection: Access to Justice and Fairness in the American Criminal Justice System?*, 8 DEPAUL J. FOR SOC. JUST. 175, 184 (2015) (“We are arguably no longer under Jim Crow or de jure discrimination; however, unfortunately and regrettably, we are presently realizing manifest de facto discrimination, or the new Jim Crow. Today’s statistics and trends detail and depict a sustained process of de facto discrimination, as well as a continued departure from Section 1 of the 14th Amendment.”).

society and the legal system shouts the opposite: that extinguishing black lives is legally, constitutionally, and culturally permissible and that black lives do not, in fact, matter.<sup>6</sup>

### A. Objectives: What Is Police Accountability?

This note will examine contemporary policing, the use of fatal force, and current forms of racism as well as the role of the “Black Lives Matter” movement in catalyzing change by challenging dominant narratives surrounding police and policing, as well as policing practices.<sup>7</sup> The purpose of this note is to understand present-day forms of racism, operating within and perpetuated by current Equal Protection jurisprudence, and how this intersects with and causes the killing of unarmed black men and people of color by police.<sup>8</sup> Part I describes the problem of the use of fatal force, the racialized elements of this phenomenon, and the public mourning and outrage of the riots and protests sweeping through the country. Part II argues that understanding the problem of policing and the fatal use of force must include a reworking of how we contemplate “violence,” race and colorblindness, and the prison industrial complex and the

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6. THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 3 (2015) (“‘Black lives matter’ has become a rallying cry in light of evidence that the criminal justice system is failing to uphold this basic truth.”). See also George Yancy & Judith Butler, *What’s Wrong With “All Lives Matter”?*, N.Y. TIMES (Jan. 12, 2015, 9:00 PM), [http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/?\\_r=0](http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/?_r=0) (“One reason the chant ‘Black Lives Matter’ is so important is that it states the obvious but the obvious has not yet been historically realized. So it is a statement of outrage and a demand for equality, for the right to live free of constraint, but also a chant that links the history of slavery, of debt peonage, segregation, and a prison system geared toward containment, neutralization and degradation of black lives, but also a police system that more and more easily and often can take away a black life in a flash all because some officer perceives a threat.”).

7. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>. See CRITICAL RESISTANCE, POLICING IN OAKLAND, A YEAR IN REVIEW 2014 (describing protests in the Bay Area: “Protesters shut down the San Mateo Bridge during evening rush hour, disrupted BART service on Black Friday, gave Oakland’s new pro-police mayor a wakeup visit at the break of dawn, and showed incredible solidarity across cultural, racial and issue focus during actions at the OPD headquarters and the federal building”).

8. U.S. CONST. amend XIV (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). See generally Barbara J. Flagg, *“Was Blind, But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1992–1993).

“New Jim Crow.”<sup>9</sup> This section will further argue that this is all interconnected with the limitations placed on substantive anti-subordination principles through the foreclosure of the Equal Protection doctrine as a vehicle for plaintiffs of color.<sup>10</sup>

Part III will focus on private constitutional and statutory remedies for police violence, why and how the legal system failed when the grand juries did not indict, and what the current federal civil rights standard is under 18 U.S.C. § 242.<sup>11</sup> It will also offer a critique of rights discourse, narrow legal reform generally, and the overarching Equal Protection standards that largely preclude disparate impact analysis.<sup>12</sup> Part IV will examine solutions to the problem of police violence, such as body cameras, federal oversight and intervention, transparency, attention to disparate impact and implicit bias, increased data and record-keeping on officer-involved killings, and other ways to try to prevent deaths and increase police accountability.<sup>13</sup>

Ultimately, these solutions are aimed at narrow legal reforms that may or may not address the particularized issues at hand and potentially fail to recognize how the discourse of post-racialism and colorblindness—combined with the limitations Equal Protection

9. Yancy & Butler, *supra* note 6 (“[T]he point is not just that black lives can be disposed of so easily: they are targeted and hunted by a police force that is becoming increasingly emboldened to wage its race war by every grand jury decision that ratifies the point of view of state violence.”); OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 117 (2014) (“Scholars have repeatedly shown how colorblindness uses misguided notions of formal racial equality to maintain substantive racial inequality and White racial privilege.”).

10. James M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

11. U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 9 (2015).

12. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (offering a critique of rights discourse and the usefulness of “rights”); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011) (describing the limitations of legal reform); Flagg, *supra* note 8 (speaking to the limitations placed on Equal Protection).

13. *We Can End Police Violence in America*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/#vision> (last visited Sept. 28, 2015) (describing ten key reforms, from limiting use of force to demilitarizing police forces); Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), [http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html?\\_r=0](http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html?_r=0). See also Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313, 316 (2015) (characterizing “implicit bias” as referring to “stereotypes or attitudes that operate without an individual’s conscious awareness”).

jurisprudence has placed on disparate impact—has vast and harmful implications that contribute to a system of subordination and marginalization.<sup>14</sup> Hence, the goals of this note are, in equal measure, to discuss legal mechanisms for the protection of rights and to critically examine the interlocking nature of contemporary racism—including U.S. Supreme Court jurisprudence around racism—and policing and the prison industrial complex.<sup>15</sup> Thus, this note argues that (1) colorblindness and jurisprudential limits placed on Equal Protection and constitutional remedies enable a legal system with little to no legal accountability and (2) the legal system should require greater oversight, responsibility, transparency, accountability, and access to constitutional remedies when officers kill individuals.<sup>16</sup>

## B. “Black Lives Matter”: Policing, Race, and Protest

Police brutality is a perennial and controversial issue in the U.S.<sup>17</sup> The deaths of Michael Brown and Eric Garner at the hands of white

14. Osagie K. Obasogie, *Do Blind People See Race? Social, Legal, and Theoretical Considerations*, 44 LAW & SOC’Y REV. 585, 611–12 (2010) (regarding the discourse of colorblindness, Professor Obasogie argues that “[a]ny commitment to racial justice needs a deeper understanding with race as a social and cultural issue rather than relying upon a jurisprudence of racial nonrecognition.”). See also Barbara Jeanne Fields, *Slavery, Race, and Ideology in the United States of America*, 181 NEW LEFT REVIEW 118 (1990) (“If race lives on today, it can do so only because we continue to create and re-create it in our social life, continue to verify it, and thus continue to need a social vocabulary that will allow us to make sense, not of what our ancestors did then, but of what we ourselves choose to do now.”). See, e.g., Equal Justice Initiative, *Florida Police Use Photos of African Americans for Target Practice*, EQUAL JUSTICE INITIATIVE (Jan. 16, 2015), <http://www.eji.org/node/1030> (describing the fact that some police departments actually use images of black Americans when practicing shooting).

15. THE SENTENCING PROJECT, *supra* note 6, at 3.

16. *Id.*; *Solutions*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/solutions/#solutionsoverview> (last visited Sept. 28, 2015); Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> (“Among the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been charged, a Post analysis found. Most were cleared or acquitted in the cases that have been resolved.”). See, e.g., Krishnadev Calamur, *Justice Dept. Faults Philly Police For Poor Training On Deadly Force Policy*, NPR (Mar. 23, 2015, 1:43 PM), <http://www.npr.org/blogs/thetwo-way/2015/03/23/394884832/justice-dept-faults-philly-police-for-poor-training-on-deadly-force-policy> (“Philadelphia’s police officers ‘do not receive regular, consistent training on the department’s deadly force policy,’ the Justice Department said . . . in a review of the city’s 394 officer-involved shootings between 2007 and 2014.”).

17. CRITICAL RESISTANCE, *supra* note 7 (“As we mourned the murders at the hands of the cops of Mike Brown in Ferguson, MO, and Eric Garner in Staten Island, NY, we were reminded of the long list of people killed by police.”). See also Natasha Bach, *Police Violence Has Been Going On Forever. No Wonder People Are Fed Up With It*, THE

police brought police brutality and the fatal use of force to center stage once again.<sup>18</sup> Massive protests and riots erupted in Ferguson, Oakland, and elsewhere, making the issue visible and bringing rage to the streets.<sup>19</sup> In April of 2015, massive riots and protests again erupted throughout the country, especially in Baltimore, when police killed Freddie Gray.<sup>20</sup> Large-scale riots and protests continue as police violence continues unabated in 2015, in a manner that is arguably just as bad if not worse than in 2014.<sup>21</sup>

One of the main problems with police violence is the lack of transparency and record-keeping.<sup>22</sup> The death of a person of color is such a mundane event for police that keeping track of how many people are killed is not even standard practice.<sup>23</sup> An important impact of the pressure placed on police and government by the riots, protests, and organizing is the increased attention to the number of deaths at the hands of police.<sup>24</sup> Hence, official statistics about the

HUFFINGTON POST (Aug. 28, 2014, 12:00 PM), [http://www.huffingtonpost.com/2014/08/23/police-brutality-michael-brown\\_n\\_5700970.html](http://www.huffingtonpost.com/2014/08/23/police-brutality-michael-brown_n_5700970.html).

18. This is an issue where, every few years, police brutality reappears in mainstream media and public discourse. It is a common occurrence that people of color are killed by police, but sometimes protests and riots take place that bring an otherwise invisible issue to light. Kimani Gray, age sixteen, in Brooklyn in 2013 and Oscar Grant in Oakland in 2009 are two main examples. See, e.g., Jennifer De Pinto et al., *Michael Brown and Eric Garner: The Police, Use of Force and Race*, CBS NEWS (Dec. 10, 2014, 6:31 PM), <http://www.cbsnews.com/news/michael-brown-and-eric-garner-the-police-use-of-force-and-race/>; J. David Goodman & Tim Stelloh, *Police Kill 16-Year-Old They Say Pointed a Handgun* (Mar. 10, 2013), [http://www.nytimes.com/2013/03/11/nyregion/16-year-old-killed-by-new-york-police.html?\\_r=0](http://www.nytimes.com/2013/03/11/nyregion/16-year-old-killed-by-new-york-police.html?_r=0).

19. Jelani Cobb, *Chronicle of a Riot Foretold*, THE NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/daily-comment/chronicle-ferguson-riot-michael-brown>. See also The Editorial Board, *The Meaning of the Ferguson Riots*, N.Y. TIMES (Nov. 25, 2014), [http://www.nytimes.com/2014/11/26/opinion/the-meaning-of-the-ferguson-riots.html?\\_r=0](http://www.nytimes.com/2014/11/26/opinion/the-meaning-of-the-ferguson-riots.html?_r=0).

20. Sheryl Gay Stolberg & Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray's Death*, N.Y. TIMES (Apr. 25, 2015), <http://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html>.

21. *The Counted: People Killed by Police in the US*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Sept. 29, 2015).

22. Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/> (speaking to the fact that there is little actual and reliable data and statistics kept by the federal government or national research groups, according to criminal justice experts).

23. Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Stats*, WALL ST. J. (Dec. 3, 2014, 11:26 AM), <http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504>.

24. See, e.g., THE GUARDIAN, *supra* note 21.

number of people police kill each year are uncertain but indicate, at the very least, incredible disproportionality in terms of the race of those killed.<sup>25</sup> As of late August, 2015, police have killed approximately 742 people, of which 108 were Latino, 194 were black, and 365 were white.<sup>26</sup> This means that, per one million African Americans, 4.64 African Americans were killed by police, while, per one million white Americans, 1.84 were killed.<sup>27</sup>

Although it has been questioned and debated, the most basic fact remains that every twenty-eight hours, police, security guards, or vigilantes kill a black person.<sup>28</sup> From 2005 to 2012, a white police officer killed a black American almost two times per week, according to FBI data.<sup>29</sup> Over half of those killed by police recently are black or Latino.<sup>30</sup> African Americans are thirteen percent of the U.S. population but are twenty-six percent of police shootings.<sup>31</sup> Young black men are shot and killed by police at twenty-one times the rate

25. THE SENTENCING PROJECT, *supra* note 6, at 3. See also Maya Rhodan, *White House Task Force Calls for Better Data on Police Shootings*, TIME (Mar. 2, 2015) (stating that, in a recent report, the task force President Obama created in late 2014 called for improved record keeping of officer-involved shootings.); Michael S. Schmidt, *F.B.I. Director Speaks Out on Race and Police Bias*, N.Y. TIMES (Feb. 12, 2015), [http://www.nytimes.com/2015/02/13/us/politics/fbi-director-comespeaks-frankly-about-police-view-of-blacks.html?\\_r=0](http://www.nytimes.com/2015/02/13/us/politics/fbi-director-comespeaks-frankly-about-police-view-of-blacks.html?_r=0) (reporting on FBI Director James Comey statement that there should be more reporting on officer-involved shootings that could go into an accessible database because, as of now, there is no such system and these statistics do not exist. Director Comey said that it was “ridiculous that I can’t tell you how many people were shot by the police last week, last month, last year”).

26. THE GUARDIAN, *supra* note 21. See also *The Problem*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/problem> (last visited Sept. 28, 2015) (“More than one thousand people are killed by police every year in America.”); *The National Police Violence Map*, MAPPING POLICE VIOLENCE (2015), <http://mappingpoliceviolence.org> (“At least 208 black people have been killed by police in the U.S. in 2015.”).

27. *Id.* See also Wesley Lowery, *Police Shot and Killed More People in July Than Any Other Month So Far This Year*, WASH. POST (Aug. 3, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/08/03/police-shot-and-killed-more-people-in-july-than-any-other-month-so-far-this-year/>.

28. Michelle Ye Hee Lee, *The Viral Claim That a Black Person is Killed by Police “Every 28 Hours,”* WASH. POST (Dec. 24, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/24/the-viral-claim-that-a-black-person-is-killed-by-police-every-28-hours/>.

29. Kevin Johnson et al., *Local Police Involved in 400 Killings Per Year*, USA TODAY (Aug. 15, 2014, 9:41 AM), <http://www.usatoday.com/story/news/nation/2014/08/14/police-killings-data/14060357/>.

30. THE SENTENCING PROJECT, *supra* note 6, at 3.

31. Mike Males, *Who Are Police Killing?*, CENTER ON JUVENILE AND CRIMINAL JUSTICE (Aug. 26, 2014), <http://www.cjcj.org/news/8113>.



of young white men.<sup>32</sup> Thirty-three percent of black victims are unarmed.<sup>33</sup> Thus, despite the fact that police departments and federal, state, and local governments fail to keep reliable data, the trend is clear that police disproportionately kill people of color.<sup>34</sup>

Because of the high-profile killings of Eric Garner, Mike Brown, Freddie Gray, and Walter Scott (among the countless others), this is an important moment to reflect on and critically examine police brutality and contemporary racism in order to change policing and the legal system.<sup>35</sup> In this moment in history, the killing of black, unarmed men by police is a normal part of policing and a nearly daily event.<sup>36</sup> The only difference between the deaths of Mike Brown, Eric Garner, and Freddie Gray and the deaths of the many others who receive no notoriety or news coverage is that, in the case of the

32. Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killing*, 9 HARV. BLACKLETTER J. 1, 1–2 (1992) (noting disproportionate rates of use of excessive and deadly force against people of color). See also Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white>; Nicholas Kristof, *When Whites Just Don't Get It, Part 5*, N.Y. TIMES (Nov. 29, 2014), [http://www.nytimes.com/2014/11/30/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-5.html?\\_r=0](http://www.nytimes.com/2014/11/30/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-5.html?_r=0).

33. *The National Police Violence Map*, *supra* note 26.

34. Kanya Bennett, *Over 100 People Were Killed by Police in March. Have Police Gotten the Post-Ferguson Memo Yet?*, ACLU (Apr. 1, 2015, 10:15 AM), <https://www.aclu.org/blog/criminal-law-reform-free-speech-racial-justice/over-100-people-were-killed-police-march-have-po> (“Excessive and deadly use of force, disproportionately against people of color and people with psychiatric disabilities, is driving national discourse.”).

35. See, e.g., Jeffrey Toobin, *How Not to Use a Grand Jury*, THE NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury>; Bennett L. Gershman & Joel Cohen, *This Case Cries Out for Disclosure: What Were Grand Jurors Told About Eric Garner's Death?*, SLATE (Dec. 8, 2014, 4:54 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/12/daniel\\_pantaleo\\_statens\\_island\\_grand\\_jury\\_why\\_did\\_it\\_refuse\\_to\\_indict\\_eric.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/daniel_pantaleo_statens_island_grand_jury_why_did_it_refuse_to_indict_eric.html).

36. Although some individuals killed by police are armed, unlike Michael Brown, Oscar Grant, or Eric Garner, this is in many ways more of a politicized issue of what that “fact” can be used for, in mobilizing hatred of a victim or delegitimizing the individual as a victim. In other words, the dichotomy between being “armed” and being “unarmed” is often more political than a mere fact of actual danger. See Jackie Wang, *Against Innocence*, in LIES: A JOURNAL OF MATERIALIST FEMINISM, VOL. 1 147 (Lies Collective ed., 2012). See, e.g., Elliot Hannon, *Dashcam Video Shows New Jersey Police Shooting Man With Hands Raised During Traffic Stop*, SLATE (Jan. 21, 2015) (summarizing the different media accounts of a recent police shooting in December 2014 and describing what transpired during the traffic stop, in which Jerame Reid, who was unarmed but did have a gun visible in the glove compartment, was shot and killed by police). See generally Eugene Robinson, *What America's Police Departments Don't Want You to Know*, WASH. POST (Dec. 1, 2014), [http://www.washingtonpost.com/opinions/eugene-robinson-its-a-crime-that-we-dont-know-how-many-people-police-shoot-to-death/2014/12/01/adedcb00-7998-11e4-b821-503cc7efed9e\\_story.html](http://www.washingtonpost.com/opinions/eugene-robinson-its-a-crime-that-we-dont-know-how-many-people-police-shoot-to-death/2014/12/01/adedcb00-7998-11e4-b821-503cc7efed9e_story.html).

former, the ensuing protests and “riots” received national attention and developed into the “Black Lives Matter” movement, pushing all levels of government to take action when the court system failed to provide accountability.<sup>37</sup> Recently, national attention has focused on two other victims of police and vigilante violence—Oscar Grant and Trayvon Martin.<sup>38</sup> Those deaths—the former killed by a BART police officer and the latter killed by a civilian—were part of the lead up to the current movement.<sup>39</sup>

If no meaningful change happens at either federal or local levels, this issue will persist as it always has.<sup>40</sup> The riots, protests, and litigation surrounding the deaths of Mike Brown and Eric Garner were bigger than the individual cases and brought the interconnected issues of policing and race into the spotlight, demonstrating that the everyday, non-aberrational deaths of black Americans are something that can and *should* be avoided.<sup>41</sup> Public mourning has tremendous

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37. CAMPAIGN ZERO, *supra* note 13 (“It will take deliberate action from policy-makers at all levels of government to implement these policy solutions.”). See also Jonathan Capehart, *From Trayvon Martin to “Black Lives Matter,”* WASH. POST (Feb. 27, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/>.

38. Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), <http://thefeministwire.com/2014/10/blacklivesmatter-2/> (“Black Lives Matter is an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise.”).

39. Heather Smith, *Meet the BART-Stopping Woman Behind “Black Lives Matter,”* GRIST (Dec. 4, 2014), <http://grist.org/politics/stopping-a-bart-train-in-michael-browns-name/> (tracing the beginnings of the movement to the acquittal of George Zimmerman in the killing of Trayvon Martin); Patrisse Cullors, *Opinion: #BlackLivesMatter Will Continue to Disrupt the Political Process*, WASH. POST (Aug. 18, 2015) (“#BlackLivesMatter was created in 2013 after Trayvon Martin’s murderer, George Zimmerman, was acquitted for his crime, and dead 17-year old Trayvon was posthumously placed on trial for his own murder. Black Lives Matter is both a network and a movement.”).

40. THE SENTENCING PROJECT, *supra* note 6, at 3 (“In the wake of the fatal police shooting of unarmed teenager Michael Brown in Ferguson, Missouri, and that officer’s non-indictment, a growing number of Americans are outraged and demanding change.”). See Schmidt, *supra* note 25 (quoting FBI Director Comey: “We all have work to do—hard work to do, challenging work—and it will take time.”).

41. Kindy & Kelly, *supra* note 16 (“After the death of Michael Brown last summer, concerns about racism in policing have exploded in public debate, in particular whether white officers use excessive force when dealing with minorities and whether the criminal justice system protects the victims’ rights.”). See, e.g., Elisha Fieldstadt, *Black Teen Tony Robinson Shot Dead by Cop in Madison, Wisconsin, Was Unarmed*, NBC NEWS (Mar. 7, 2015) (reporting on the killing of Tony Robinson, age nineteen); Vivian Ho, *SFPD Names Officers Involved in Fatal Alex Nieto Shooting*, SFGATE (Jan. 3, 2015, 12:26 PM), <http://www.sfgate.com/bayarea/article/SFPD-names-officers-involved-in-the-Alex-Neito-5991200.php>. (on the killing of Alex Nieto, age twenty-eight); Kate Mather et al., *Ezell Ford Autopsy Prompts New Protests, Calls for Caution*, LA TIMES (Dec. 29, 2014, 9:04

significance because it transforms those who society and the police deem not grievable and capable of being killed and forgotten, into beings who can be publicly mourned, remembered, and appreciated after their lives are extinguished.<sup>42</sup> As Michel Foucault put it, “race or racism is the precondition that makes killing acceptable.”<sup>43</sup> Eric Garner, Michael Brown, Tamir Rice, Walter Scott, and Oscar Grant were real, living people, killed by white police.<sup>44</sup> Usually, an issue like this will run its course and the world will forget, the media will stop reporting on it, and society at large will move on.<sup>45</sup> The protests and riots are keeping this issue in the forefront, however, by preventing the legal and cultural systems from forgetting, by showing outrage and grief about the fact that officers can kill people of color with little legal recourse, and by putting pressure on all levels of government to control police.<sup>46</sup>

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PM), <http://www.latimes.com/local/lanow/la-me-ln-ezell-ford-autopsy-20141229-story.html#page=1> (reporting on the killing of Ezell Ford, age twenty-five); Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man is Killed*, N.Y. TIMES (Feb. 25, 1999), <http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html> (reporting on the killing of Amadou Diallo, age twenty-two).

42. Yancy & Butler, *supra* note 6 (“The practices of public mourning and political demonstration converge: when lives are considered ungrievable, to grieve them openly is protest.”); JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 26–27 (2004) (“Whose lives count as lives? And finally, what *makes for a grievable life?*”).

43. MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE 256 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 1997) (1975–1976).

44. Trymaine Lee, *Eric Garner’s Mother: ‘His Name Will Be Remembered,’* MSNBC (Dec. 4, 2014, 9:26 PM), <http://www.msnbc.com/msnbc/eric-garners-mother-his-name-will-be-remembered>; CRITICAL RESISTANCE, *supra* note 7 (“Guilty or not guilty will not bring Michael Brown or Eric Garner back, and will not prevent the next shooting of a Black or Brown person by police.”).

45. Robert Stephens II, *In Defense of the Ferguson Riots* (Aug. 14, 2014), JACOBIN, <https://www.jacobinmag.com/2014/08/in-defense-of-the-ferguson-riots/> (“Malcolm X reminds us that media is a key instrument of subjugation because it determines which acts are respectable and which are extreme and thus illegitimate.”). See also Ashley Fantz & Holly Yan, *S. Carolina Police Shooting: Cop is Charged With Murder, Protestors Call For Justice*, CNN (Apr. 8, 2015) (demonstrating the additional fact that the mainstream media attempts to take race out of the discussion of police brutality, even when specifically black men continue to be killed by police, by making statements such as “it’s unknown if race was a factor.”). See generally GUY DEBORD, *SOCIETY OF THE SPECTACLE* 12 (1967) (“The spectacle is not a collection of images; rather, it is a social relationship between people that is mediated by images.”).

46. Protests and organizing are ongoing. See Jay Caspian Kang, *‘Our Demand Is Simple: Stop Killing Us,’* N.Y. TIMES MAGAZINE (May 4, 2015), <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>. See also Chase Madar, *Why It’s Impossible to Indict a Cop*, THE NATION (Nov. 24, 2014) (speaking to how “the

Ultimately, how the "public" behaves after a judicial decision regarding an officer's conduct is based on how legitimate or fair it perceives that judicial decision to be.<sup>47</sup> What happens when the legal system gets something "wrong," whether through local corruption, the fallibility of the grand jury system, or the fact that remedies for police violence may be too limited?<sup>48</sup> Riots and protests happen when people believe the justice system has failed and police got off just because they were police.<sup>49</sup> In both the Mike Brown and Eric Garner cases, neither officer was criminally sentenced, let alone charged with anything from manslaughter to murder, as neither case moved past the very low bar set by grand juries.<sup>50</sup> This is common, as officers

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system protects police."). See generally ANN CVETKOVICH, *DEPRESSION: A PUBLIC FEELING* 7 (2012) ("The limits of political representation and legal recognition in eliminating racism require not only new visions for the future but the affective energy to sustain disappointment."); Judith Butler, *BODIES IN ALLIANCE AND THE POLITICS OF THE STREET* (Sept. 2011), <http://www.eipcp.net/transversal/1011/butler/en> ("In my view, a different social ontology would have to start from the presumption that there is a shared condition of precarity that situates our political lives."); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 117 (1998) ("Equipped with a broader sense of possibility, we can stand back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.").

47. Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012) ("[A] criminal justice system perceived to be procedurally unfair or substantively unjust may provoke resistance and subversion, and may lose its capacity to harness powerful social and normative influence."); MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* 134 (2014) ("Claims of injustice or justice made in the name of the law recall hearers to what a speaker takes, perhaps mistakenly, to be the common practices and judgments of the two, or rather, of the 'community' to which they both belong."). See also William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOCIETY REVIEW 631, 641 (1980–81) ("Attribution theory asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious.").

48. Robert "Biko" Baker, *How to Turn the Ferguson Protests into a New Civil Rights Movement*, VANITY FAIR (Dec. 1, 2014, 3:26 PM), <http://www.vanityfair.com/news/daily-news/2014/12/ferguson-protests-new-civil-rights-movement> ("It doesn't take a constitutional scholar to see that something was wrong with the grand jury process.").

49. Fields, *supra* note 14, at 103 ("Ultimately, the only check upon oppression is the strength and effectiveness of resistance to it.").

50. Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How The Grand Jury Reached a Decision*, NPR (Nov. 25, 2014, 6:41 AM), <http://www.npr.org/blogs/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision>; Holly Yan & Catherine E. Shoichet, *Family Calls for Peaceful Protests After Police Kill Unarmed Wisconsin Teen*, CNN (Mar. 9, 2015, 10:02 PM), <http://www.cnn.com/2015/03/09/us/wisconsin-protests/> (describing protests in Madison, Wisconsin in response to the killing of an unarmed, biracial nineteen-year-old by police).

seldom face an actual indictment or charges for excessive use of force when they kill people of color.<sup>51</sup> Even when officers are indicted or charged, this does not mean the issue is resolved; charges will not necessarily trigger the large-scale change essential to preventing more deaths.<sup>52</sup> When individuals feel that constitutional rights were violated and there is no recourse, they may find that the only option is to take extralegal, public action.<sup>53</sup> As was witnessed first in Ferguson, and as we have seen in many other U.S. cities like Baltimore and Oakland, when people utilize First Amendment protections to protest and publicly assemble, militarized police forces are called in to stop unrest.<sup>54</sup>

Reading events is a political, ideological process involving implicit and explicit racial bias and the reification of conceptions of “race,” “justice,” and “criminality” that play into how a situation like the death of a young black man “makes sense.”<sup>55</sup> Just as “the law

51. THE SENTENCING PROJECT, *supra* note 6, at 3. See also CRITICAL RESISTANCE, *supra* note 7 (“We know that cops are rarely delivered guilty verdicts, and even when they are, the system continues to work as it was designed.”); Taylor Kate Brown, *The Cases Where US Police Have Faced Killing Charges*, BBC (Apr. 8, 2015), <http://www.bbc.com/news/world-us-canada-30339943>; Henry K. Lee & Kale Williams, *4 Cops Cleared in Alex Nieto Killing*, SFGATE (Feb. 13, 2015, 4:35 PM), <http://www.sfgate.com/bayarea/article/4-San-Francisco-cops-cleared-in-Alex-Nieto-killing-6079794.php>; David A. Graham, *The Shockingly Familiar Killing of Walter Scott*, THE ATLANTIC (Apr. 8, 2015).

52. See, e.g., Mark Berman, *South Carolina Police Officer in Walter Scott Shooting Indicted on Murder Charge*, WASH. POST (June 8, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/06/08/police-officer-who-shot-walter-scott-indicted-for-murder/>.

53. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1866–67 (1987) (“[R]ights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted.”). See generally Amy Davidson, *What the Eric Garner Grand Jury Didn’t See*, THE NEW YORKER (Dec. 4, 2014), <http://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see>.

54. THE SENTENCING PROJECT, *supra* note 6, at 3. See also Maria Konnikova, *Dressed to Suppress*, THE NEW YORKER (Dec. 3, 2014), <http://www.newyorker.com/science/maria-konnikova/will-decreasing-police-use-military-gear-prevent-another-ferguson> (describing programs that gave police forces “military-style equipment” but failed to provide “guidance on how to properly deploy” it).

55. JODI MELAMED, REPRESENT AND DESTROY: RATIONALIZING VIOLENCE IN THE NEW RACIAL CAPITALISM 2 (2011) (“[R]acialization displaces its differential value making into world-ordering systems of difference, concealing its performative work with its constative work.”); Nick J. Sciallo, *The Ghosts of White Supremacy: Trayvon Martin, Michael Brown, and the Specters of Black Criminality*, 117 W. VA. L. REV. 1397, 1397 (2015) (“We are haunted by the specters of white supremacy conveniently masked in the avatar of black criminality.”); Tressie McMillan Cottom, *Race is Always the Issue*, THE ATLANTIC (Sept. 17, 2015), <http://www.theatlantic.com/politics/archive/2015/09/race-is-always-the-issue/405295/> (“From academia to politics to media, Americans talk about race and racism much as they always have. They fight proxy wars but the terms of battle are the

creates persons,” it creates events as well by constructing them, filling them with meaning and intelligibility.<sup>56</sup> Discourse and the politics of knowledge shape how events are read, understood, and digested.<sup>57</sup> By acknowledging the power that law and speech have to define an event, the naming process becomes an essential site for legal and

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same. Black freedom has always been circumscribed and the means of circumscription have proven resilient. Whether the supposed issue is crime or schools and whether the accepted cause is biological or cultural, black folks are always a problem not to be solved but contained.”). See also Chris Mooney, *Across America, Whites Are Biased and They Don’t Even Know It*, WASH. POST (Dec. 8, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/>. See generally Fields, *supra* note 14, at 110 (“Ideology is best understood as the descriptive vocabulary of day-to-day existence, through which people make rough sense of the social reality that they live and create from day to day.”).

56. COLIN DAYAN, *THE LAW IS A WHITE DOG* xvii (2011). See also Obasogie, *supra* note 14, at 589 (speaking to the ways in which “social and legal forces create the meanings that people attach to different human bodies”); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 1 (1952) (“We attach a fundamental importance to the phenomenon of language and consequently consider the study of language essential for providing us with one element in understanding the black man’s dimension of being-for-others, it being understood that to speak is to exist absolutely for the other.”); JACQUES LACAN, *ÉCRITS* 136 (1966) (“As an interjection, during the tragedy’s intermission, it is my cry of impatience or the sign of my boredom: ‘Curtain!’ It is, finally, an image of meaning *qua* meaning, which must be unveiled if it is to reveal itself.”); STEVEN L. WINTER, *A CLEARING IN THE FOREST* 332 (2001) (“The social processes that make law meaningful and those by which we make law are, necessarily, one and the same.”). See generally Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 320 (2002); Robert F. Blomquist, *Overinterpreting Law*, 116 PENN ST. L. REV. 1081, 1084 (2012).

57. MELAMED, *supra* note 55, at 2 (racial formations “exert their strongest influence in a viral fashion by shaping the content of modern knowledge systems (e.g., law, politics, and economy) and delimiting permissible expressions of personhood.”). See generally MICHEL FOUCAULT, *POWER KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972–1977* 69 (Colin Gordon ed., 1980) (“There is an administration of knowledge, a politics of knowledge, relations of power which pass via knowledge and which, if one tries to transcribe them, lead one to consider forms of domination.”); DEBORD, *supra* note 45, at 19 (“By means of the spectacle the ruling order discourses endlessly upon itself in an uninterrupted monologue of self-praise.”).

socio-cultural intelligibility.<sup>58</sup> Dominant narratives, analyses, and imagery must also be fundamentally disrupted.<sup>59</sup>

## II. A Constellation of Causes: “Violence,” the Prison Industrial Complex and the New Jim Crow, and Colorblindness and Equal Protection

The following section argues that police violence should be understood *as* “violence,” that colorblindness and post-racialism cabin anti-racism and anti-subordination (especially within Equal Protection jurisprudence), and that the prison industrial complex and the New Jim Crow are indispensable frameworks within which fatal and excessive force is *one* harmful manifestation of a regime of over-policing and over-incarceration of people of color.<sup>60</sup> This section further argues that Equal Protection jurisprudence and the intent doctrine have basically foreclosed the argument of constitutional violations based on the Fourteenth and Fifth Amendments for plaintiffs of color.<sup>61</sup> However, as we see with the June 2015 Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, there is now a chance for a new era of Equal Protection doctrine and disparate-impact analysis that would change how and when plaintiffs of color could access

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58. Obasogie, *supra* note 14, at 590 (arguing that “visual observations and their salience are not neutral or unmediated engagements with the world but rather produced, so to speak, from the ‘inside out’ by iterative social practices that make seeing the world a certain way possible—particularly when it comes to race.”). *See also* Felstiner et al., *supra* note 47, at 631–32 (“But disputes are not things: they are social constructs. Their shapes reflect whatever definition the observer gives to the concept.”). *See generally* TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 63 (1992) (“Race has become metaphorical—a way of referring to and disguising forces, events, classes, and expressions of social decay and economic division far more threatening to the body politic than biological ‘race’ ever was.”).

59. Sciallo, *supra* note 55, at 1398 (“We as scholars, lawyers, and activists must challenge dominant discourses that displace, obscure, and obfuscate the centrality of whiteness in our everyday lives.”); WINTER, *supra* note 56, at 332 (“Law is constituted and sustained not by edict or statute but in the forms of life that give meaning to our categories, concepts, and values.”).

60. Aliya Saperstein et al., *The Criminal Justice System and the Racialization of Perceptions*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 106 (2014) (“The role of policing, courts, and prisons in perpetuating racial inequality has led some to call the contemporary criminal justice system the ‘New Jim Crow.’”). *See also* The Editorial Board, *Justice Kennedy’s Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), [http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html?\\_r=0](http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html?_r=0) (Justice Kennedy told the House appropriations subcommittee that the “idea of total incarceration just isn’t working.”).

61. U.S. CONST. amend. XIV; U.S. CONST. amend. V. *See also* Flagg, *supra* note 8.

justice.<sup>62</sup> Thus, this section primarily argues that these elements of contemporary jurisprudence and the criminal justice system vastly constrain the capacity for those subjected to police violence to seek any meaningful redress or remedy in the courts.

### A. “Violence”

It is important to establish that police killing unarmed people is “violence.”<sup>63</sup> The police operate within the state form, with the concept of a “state” meaning “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”<sup>64</sup> “Violence” existing outside of the law destabilizes the legal system itself.<sup>65</sup> The state’s need to monopolize violence is based on the fact that “violence, when not in the hands of the law, threatens [the rule of law] not by the ends that it may pursue but by its mere existence outside the law.”<sup>66</sup> Legal violence (that of the state) is exercised through police forces, which, when the law fails to restrain or compel an actor to behave in accordance with law, can utilize state-sanctioned violence against that actor.<sup>67</sup> Police forces use

62. Tex. Dep’t of Housing and Cmty. Affairs v. Inclusive Comm’tys. Project, 135 S. Ct. 2507 (2015). See also Bill Chappell, *In Fair Housing Act Case, Supreme Court Backs ‘Disparate Impact’ Claim*, NPR (June 25, 2015, 12:26 PM), <http://www.npr.org/sections/the-two-way/2015/06/25/417433460/in-fair-housing-act-case-supreme-court-backs-disparate-impact-claims>.

63. LACAN, *supra* note 56, at 198 (“I consider it an urgent task to isolate, in concepts that are being deadened by routine use, the meaning they recover when we reexamine their history and reflect on their subjective foundations.”).

64. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (Hans Gerth & C. Wright Mills eds., 1958) (1946).

65. Walter Benjamin, *Critique of Violence*, in WALTER BENJAMIN: SELECTED WRITINGS 238 (Marcus Bullock & Michael W. Jennings eds., 1996). See also THOMAS HOBBS, LEVIATHAN 152 (Richard Tuck ed., 1996) (“To resist the sword of the commonwealth, in defense of another man, guilty, or innocent, no man hath liberty; because such liberty takes away from the Sovereign . . . and is therefore destructive of the very essence of government.”). See generally John W. Schoen, Amber Payne, Erin McClam, & NBC News, *Baltimore Riots: Violence Scarred a City Dealing With Decline for Decades*, NBC NEWS (Apr. 29, 2015), <http://www.nbcnews.com/storyline/baltimore-unrest/baltimore-riots-violence-scarred-city-dealing-decline-decades-n349836>.

66. Benjamin, *supra* note 65, at 239.

67. Christopher Tomlins, *To Improve the State and Condition of Man: The Power to Police and the History of American Governance*, 53 BUFF. L. REV. 1215, 1220–21 (2005); FOUCAULT, *supra* note 57, at 256 (“If the power of normalization wished to exercise the old sovereign right to kill, it must become racist. And if, conversely, a power of sovereignty, or in other words, a power that has the right of life and death, wishes to work with the instruments, mechanisms, and technology of normalization, it too must become racist.”). See also Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762 (2012) (“Police officers are granted immense authority by the state to impose harm.”).



a “legitimate” violence when using fatal force against individuals.<sup>68</sup> This legitimate violence is “legal intervention,” a numerical event tabulated by the Center for Health Statistics.<sup>69</sup> Thus, police “violence” is not *called* violence, even when police shoot a twelve year-old boy to death, or choke an asthmatic man to death, or execute a man face down on a train platform.<sup>70</sup>

Violence is a term reserved for property damage during protests, not for the shooting or choking of bodies deemed killable, bodies that do not “matter.”<sup>71</sup> Exposing the undercurrents and hegemonic narratives that exist in everyday life, and attempting to uncover the ideological, iterative dimensions therein is an important process.<sup>72</sup>

*See generally* Fields, *supra* note 14, at 112 (1990) (“The rule of any group, the power of any state, rests on force in the final analysis.”); SKINNER, *supra* note 46, at 119 (“The state has a duty not merely to liberate its citizens from such personal exploitation and dependence, but to prevent its own agents, dressed in a little brief authority, from behaving arbitrarily in the course of imposing the rules that govern modern life.”).

68. William B. Waegel, *How Police Justify The Use of Deadly Force*, 32 SOCIAL PROBLEMS 144, 144 (1984) (“The capacity to use force is the core of the police role and the unifying theme in police work.”). *See also* ARTHUR I. WASKOW, FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960S 2 (1966).

69. Mike Males, *Killing by Law Enforcement in California: It's Not What You Think (Part I)*, CENTER ON JUVENILE AND CRIMINAL JUSTICE (Jan. 13, 2015), <http://www.cjcj.org/news/8533>.

70. Yancy & Butler, *supra* note 6 (“The callous killing of Tamir Rice and the abandonment of his body on the street is an astonishing example of the police murdering someone considered disposable and fundamentally ungrievable.”); COATES, *supra* note 2, at 10 (“But all our phrasing—race relations, racial chasm, racial justice, racial profiling, white privilege, even white supremacy—serves to obscure that racism is a visceral experience, that it dislodges brains, blocks airways, rips muscle, extracts organs, cracks bones, breaks teeth . . . . You must always remember that the sociology, the history, the economics, the graphs, the charts, the regressions all land, with great violence, upon the body.”). *See also* Ashley Fantz et al., *Gunshots, Tear Gas in Missouri Town Where Police Shot Teen*, CNN (Aug. 12, 2014), <http://www.cnn.com/2014/08/11/us/missouri-teen-shooting/index.html>. *See generally* FOUCAULT, *supra* note 57, at 255–56 (discussing racism as “a way of fragmenting the field of the biological that power controls,” so that certain populations can be killed or allowed to die, through “indirect murder”).

71. *See generally* ELIZABETH A. POVINELLI, ECONOMIES OF ABANDONMENT: SOCIAL BELONGING AND ENDURANCE IN LATE LIBERALISM 12 (2011) (discussing a sense of inclusion and social belonging, concepts which are part of the production of coherent narratives of events through “metadiscursive” configurations that alter and cabin epistemological and ontological senses of the “violence” of events). *See, e.g.*, Scott Neuman, *Protests Over Police Killings Turn Violent in Berkeley, Calif.*, NPR (Dec. 7, 2014), <http://www.npr.org/blogs/thetwo-way/2014/12/07/369109677/protests-over-police-killings-turn-violent-in-berkeley-calif>.

72. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 118 (2014) (employing a term called “hegemonic racial violence,” which the authors “use to define the violence perpetrated by dominant group members, such as white individuals and the police, against racially subordinated individuals”);

Displaying and discussing the normative dimensions of policing—the stories that we are told about what “violence” is and what a “legal intervention” is—represents an important analytical practice that enables us to uncover counter-narratives and tell stories of policing, race, and violence differently.<sup>73</sup> This note contends that police “violence” *is* violence, a violence that should not be legitimized purely because the police enact it. Police should not face a radically different adjudicative process than non-police. This means greater accountability when the police violently kill someone.<sup>74</sup> Thus, rendering police violence cognizable as “violence” in the courts and in the media diminishes the unimpeachable legitimacy of the police. This increases the likelihood that, when police do actually violate the rights of victims, they will be held accountable for those actions.

## B. The Prison Industrial Complex and the New Jim Crow

Police shootings are a normal part of the fabric of the “prison industrial complex” and the criminal punishment system generally.<sup>75</sup>

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WINTER, *supra* note 56, at 332 (“Once we have noticed the tacit decisions that mark out the social field, we are in a position to rework them from the very place we stand: situated not just in our cultural and historical tradition, but in a real physical and social world that we construct and reconstruct through acts of imagination and commitment.”). See generally Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1564 (1984) (“This effort to critically re-experience the phenomena of everyday life with an eye to illuminating their hidden meanings” is valuable because it shows the ways that “law is ‘constitutive’ of our social experience,” which “becomes apparent the moment we try to grasp what ‘the law’ actually is.”).

73. SKINNER, *supra* note 46, at 116 (“As we analyse and reflect on our normative concepts, it is easy to become bewitched into believing that the ways of thinking about them bequeathed to us by the mainstream of our intellectual traditions must be *the* ways of thinking about them.”); JUDITH BUTLER, *SENSES OF THE SUBJECT* 5 (2015) (“It is always possible to refer to a norm as a singular kind of thing, but let us remember that norms tend to arrive in clusters, interconnected, and that they have both spatial and temporal dimensions inseparable from what they are, how they act, and how they form what they act upon.”).

74. COATES, *supra* note 2, at 9 (“Sell cigarettes without the proper authority and your body can be destroyed. Resent the people trying to entrap your body and it can be destroyed. Turn into a dark stairwell and your body can be destroyed. The destroyers will rarely be held accountable. Mostly they will receive pensions.”).

75. THE SENTENCING PROJECT, *supra* note 6, at 3 (asserting that normalized over-policing and the “criminal justice system’s high volume of contact with people of color is a major cause of African Americans’ disproportionate rate of fatal police encounters”); FARHAD DALAL, *RACE, COLOUR AND THE PROCESSES OF RACIALIZATION* 209 (2002) (“Once the structures of society take over and perpetuate the mechanisms of exclusion and subjugation, they become invisible amongst the day-to-day activities of living.”); FOUCAULT, *supra* note 57, at 256 (“When you have a normalizing society, you have a power which is, at least superficially, in the first instance, or in the first line of biopower,

The prison industrial complex and the “New Jim Crow” are the backdrop of the drama of policing.<sup>76</sup> Over-criminalization, over-punishment, and discriminatory policing and prosecution define the contemporary criminal justice system.<sup>77</sup> Policing strategies and styles are dictated by this racialized criminal justice system. This affects daily policing activities, such as who police deem suspicious and subject to *Terry* stops, and who police shoot when they perceive a threat.<sup>78</sup> Ultimately, “prisons are partial geographical solutions to political economic crises, organized by the state, which is itself in crisis.”<sup>79</sup> Thus, policing and incarceration are not isolated sectors of

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and racism is the indispensable precondition that allows someone to be killed, that allows others to be killed. Once the State functions in the biopower mode, racism alone can justify the murderous function of the State.”). See also Jeffrey S. Adler, “*The Killer Behind the Badge*”: Race and Police Homicide in New Orleans, 1925–1945, 30 LAW & HIST. REV. 495, 498 (2012) (articulating police killings as a historical means to protect and maintain the status quo, racial hierarchy, and suppression).

76. Stanley, *supra* note 5, at 6 (defining the term “prison industrial complex” as a concept naming the “enormity of the prison system” and including both (1) the material buildings of prisons, jails, courts, and other physical sites, all of which “build the vastness of the PIC’s architecture,” but also (2) the tactics of surveillance, policing and other geopolitical and geospatial processes that function to group and control populations); ALEXANDER, *supra* note 5, at 18–19 (describing the ways in which the contemporary system of mass incarceration is linked to the explicit historical caste systems of “Jim Crow” and slavery). See also ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–85 (2003) (describing the prison industrial complex as “driven by ideologies of racism and the pursuit of profit”).

77. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) (arguing that these traits are “more the consequences of constitutional regulation than justifications for it”). See also Mike Males, “*Young Black Men*” Is Not A Metaphor For Violence, CENTER ON JUVENILE AND CRIMINAL JUSTICE (Dec. 30, 2014), <http://www.cjcj.org/news/8470> (“‘Young black man’ has become such an entrenched metaphor for being violently dangerous and endangered that even progressives who deplore fear of young black men contribute to it.”); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296 (2012) (describing the implications of perceived “criminality” in the decision-making process that an officer makes).

78. Christopher Mathias, *NYPD Stop and Frisk: New Report Reveals Depth of Racial Disparity in Program, Pols Call for Reform*, HUFFINGTON POST (May 10, 2012). See also Yancy & Butler, *supra* note 6 (describing the prison system and economic inequality as “forms of institutionalized destitution and inequality” which are “reproduced through daily encounters” including “the disproportionate numbers of minorities stopped and detained by the police, and the rising number of those who fall victim to police violence.”); DALAL, *supra* note 75, at 209 (“[O]nce exclusion, subjugation, and racism have been invisibilized because they are so routine and engrained, racism becomes technocratic, or in modern parlance, institutionalized.”).

79. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 26 (2007). See also WENDY BROWN, EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 37 (2005) (observing

society but are instead connected to larger systems of political economy and the maldistribution of resources.<sup>80</sup>

Law enforcement fits into a starkly racialized justice system that disadvantages and targets people of color.<sup>81</sup> Just after 1980, racial disparities increased dramatically in everything from arrests to incarceration, largely due to the “War on Drugs” initiated by the conservative Bush and Reagan administrations.<sup>82</sup> Overall, from 1980 to 2008, the number of incarcerated persons quadrupled from 500,000 to 2.3 million, with the U.S. now incarcerating twenty-five percent of the world’s prisoners.<sup>83</sup> At the turn of the century, one percent of the U.S. population was in jail or prison and three percent were on parole or probation.<sup>84</sup> Between 1982 and 1999, drug sentences in federal and state prisons increased by 975 percent.<sup>85</sup> Two-thirds of people of color in prison are there for drug offenses.<sup>86</sup> Black Americans are incarcerated at almost six times the rate of white Americans.<sup>87</sup> More than sixty percent of people in prison are people of color, and one in

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that neo-liberalism includes “efforts to . . . reduce education spending while increasing prison budgets, and feather the nests of the rich while criminalizing the poor”).

80. *Id.* See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 9 (1975) (describing the ways in which “punishment” (i.e., incarceration) “will tend to become the most hidden part of the penal process. This has several consequences: it leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime; the exemplary mechanics of punishment changes its mechanisms. As a result, justice no longer takes public responsibility for the violence that is bound up with its practice. If it too strikes, if it too kills, it is not as a glorification of its strength, but as an element of itself that it is obliged to tolerate.”).

81. Saperstein et al., *supra* note 60, at 106 (“As it currently operates, the criminal justice system differentially targets and differentially punishes black Americans, in particular, with similarly disparate consequences for their families and communities.”). See also Nicole D. Porter, *Politics of Black Lives Matter: Broadening Public Safety Priorities Beyond Arrests and Prisons*, HUFFINGTON POST (Feb. 13, 2015), [http://www.huffingtonpost.com/nicole-d-porter/politics-of-black-lives-m\\_b\\_6678912.html](http://www.huffingtonpost.com/nicole-d-porter/politics-of-black-lives-m_b_6678912.html).

82. Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQUENCY 475, 475 (1994).

83. NAACP, *Criminal Justice Fact Sheet*, <http://www.naACP.org/pages/criminal-justice-fact-sheet> (last visited Sept. 28, 2015). See Blair Hickman, *Inmate. Prisoner. Other. Discussed.*, THE MARSHALL PROJECT (Apr. 3, 2015) (discussing why terminology used to describe incarcerated persons, such as “prisoners” versus “inmates,” matters).

84. ANDREW DILTS, *PUNISHMENT AND INCLUSION: RACE, MEMBERSHIP, AND THE LIMITS OF AMERICAN LIBERALISM* 1 (2014).

85. GILMORE, *supra* note 79, at 18.

86. *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Sept. 28, 2015).

87. NAACP, *supra* note 83.

ten black men in their thirties is in prison or jail on any day.<sup>88</sup> One in three black boys will spend at least some of their lives in jail or prison, and one out of three black males is under the criminal justice system's control, such as on parole.<sup>89</sup> In 2014, more black men were incarcerated and on probation or parole than were enslaved in 1850.<sup>90</sup> In addition, one third of people disenfranchised because of felony convictions are black, which means that eight percent of all adult black Americans are disenfranchised.<sup>91</sup> Black adults are four times more likely to lose their voting rights than all other adults.<sup>92</sup> In Alabama, Kentucky, and Florida, one out of every five adult black Americans is unable to vote.<sup>93</sup> This has severe implications for the relationship between the judicial system and political participation.<sup>94</sup>

In sum, although people have always been skeptical of the police and the criminal justice system, the impacts of aggressive policing and mass incarceration have led to a massive distrust of the system's "integrity and credibility" because it is "perceived to be unfair, corrupt, biased, and error-plagued."<sup>95</sup> As described above, trust in the police has declined due to over-incarceration and criminalization, two main features of the New Jim Crow and the prison industrial complex.<sup>96</sup> According to a Pew Research Center policing survey conducted in early 2015, forty-seven percent of black respondents, and only sixteen percent of white respondents, said they had "very little" confidence in police to "do a good job of enforcing the law."<sup>97</sup> Sixty-two percent of black Americans said they had "very little"

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88. *Racial Disparity*, *supra* note 86.

89. MaryBeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England* 37 LOY. L.A. L. REV. 979, 1022 (2004).

90. Baker, *supra* note 48.

91. DILTS, *supra* note 84, at 3.

92. THE SENTENCING PROJECT, *supra* note 6, at 25.

93. DILTS, *supra* note 84, at 1.

94. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

95. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 342 (2006). *See also* Schmidt, *supra* note 25 (FBI Director James Comey speaking to law enforcement's "troubled legacy" regarding race as well as the fact that police officers can operate with "unconscious racial bias").

96. THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, INTERIM REPORT 7 (2015) (speaking to decline in trust of police). *See also* Richardson & Goff, *supra* note 72, at 145 (describing current policing models as "dehumanizing" for community members and resulting in a decrease in perceptions of legitimacy of the police).

97. *Id.* at 12.

confidence that police would treat them the same as white people.<sup>98</sup> Hence, without acknowledging the importance of the overarching criminal justice and carceral systems, and how police officers behave therein, there can be only superficial change to a perennial and significant constitutional and cultural problem.

### C. Colorblindness and Equal Protection

Post-racialism, colorblindness, and current Equal Protection doctrine further constrain this discourse on racism and anti-racism, and also undergird the logic behind letting police off when they kill people of color. Broadly speaking, World War II signaled the break up of formally racist social formations in the U.S.<sup>99</sup> During and after the Civil Rights Movement, the U.S. began transitioning from generalized and institutionally overt forms of racism, consisting of visible terror and violence, to a new regime of subtle, implicit racism. This marked the end of a period where overt white “terrorism,” white supremacy, and institutional racism and segregation were legally permitted and supported by the state.<sup>100</sup> There are three post-war periods with distinct racial formations: racial liberalism in the 1940s to 1960s, liberal multiculturalism in the 1980s and 1990s, and the neoliberal multiculturalism of the 2000s.<sup>101</sup>

Every period has a particular way of regulating race, a “regulative narrative,” both in the sense of physically regulating bodies (e.g., incarceration, execution, and assassination) and in the sense of regulating normative or hegemonic conceptualizations of race (e.g., criminalization and narratives of black criminality and villainy).<sup>102</sup> Although manifestations of overt racial violence

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98. *Id.*

99. MELAMED, *supra* note 55, at 1.

100. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 3 (stating that “terror lynchings” peaked between 1880 and 1940). See The Editorial Board, *Lynching as Racial Terrorism*, N.Y. TIMES (Feb. 11, 2015), [http://www.nytimes.com/2015/02/11/opinion/lynching-as-racial-terrorism.html?smp%20rod%3Dnytcore-iphone&smid%3Dnytcore-iphone-share&\\_r%3D0](http://www.nytimes.com/2015/02/11/opinion/lynching-as-racial-terrorism.html?smp%20rod%3Dnytcore-iphone&smid%3Dnytcore-iphone-share&_r%3D0). See also Hillary Crosley Coker, *NYT Omits Exactly Who Lynched 4,000 Blacks in the South*, JEZEBEL (Feb. 11, 2015), <http://jezebel.com/nyt-omits-exactly-who-lynched-40-000-blacks-in-the-south-1685189739>.

101. MELAMED, *supra* note 55, at 1.

102. *Id.* at 3; Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/#Chapter%20I> (“Black criminality is literally written into the American Constitution—the Fugitive Slave Clause, in Article IV of that document, declared that any ‘Person held to Service or Labour’ who escaped from one state to another could be ‘delivered up on Claim of the Party to whom such

undoubtedly exist, of which police violence is arguably one example, this note instead argues that racial violence is mediated by an overarching system that purports to be neutral, post-racial, and “colorblind,” based on the idea of increased formal access to civil rights for formerly excluded populations.<sup>103</sup> Instead of using overt violence to subdue and subordinate, current socio-political schemas mobilize discursive tropes and images of civil and constitutional rights in order to present the state, the legal system, and the police as neutral and non-racist entities.<sup>104</sup> “Post-racialism” and “colorblindness” limit legal discourse around the deaths of black Americans at the hands of the police by discrediting substantive anti-racism and anti-subordination principles.<sup>105</sup>

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Service or Labour may be due.’ From America’s very founding, the pursuit of the right to labor, and the right to live free of whipping and of the sale of one’s children, were verboten for blacks.”). See also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 26 (1995) (“The law has a regulative character and is a ‘rule’ not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and *make that reference regular*.”). See, e.g., WILLIAM L. VAN DEBURG, *HOODLUMS: BLACK VILLAINS AND SOCIAL BANDITS IN AMERICAN LIFE* 143, 152 (2004) (quoting an LAPD officer in the 1960s, responding to the Watts riots, as articulating a recurring trope regarding riots, stating that you can talk “all you want about social causes, I don’t believe they accounted for it. Face it, people gorged themselves with a healthy diet of unrestrained conduct . . . flouting the authority of government” and “burning and looting just for the sheer hell of it”).

103. See, e.g., Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, The Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.-C.L. L. REV. 275, 267–77 (2009) (describing the situation in 2009 regarding a noose hung on a branch of the “white tree” at a high school where only white students were allowed to sit and the subsequent fight between black and white students that left the black students—the “Jena Six”—charged with battery and attempted murder. “[T]he Jena Six is but one of the most overt recent examples of the routine but usually more covert racial disparities in the administration of American criminal justice.”). See also Cynthia Lee, *(E)racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 111 (2014) (arguing that conceptions of vigilantism are relevant for the present day but that the killing of Trayvon Martin by George Zimmerman under “Stand Your Ground” laws represents something different in today’s world than the vigilantism of other eras).

104. See, e.g., Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQUENCY 475, 476 (1994) (“It should go without saying in the late 20th century that governments detest racial injustice and desire racial justice, and that racial disparities are tolerable only if they are unavoidable or are outweighed by even more important social gains.”).

105. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (describing the fact that “post-racialism” is not a factually based assertion but is instead an ideological belief that serves to undermine critical racial analyses, in a similar way to “colorblindness”); TIM WISE, *COLORBLINDNESS: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY* 16 (2010) (defining “race-neutral rhetoric” and “colorblind public policy” as elements of post-racial liberalism); Cheryl L. Harris, *“Too Pure An Air:” Somerset’s Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439,

Colorblindness and Equal Protection intersect to support the constitutional requirement of intent.<sup>106</sup> This cabins and limits the reach of the Fourteenth Amendment, preventing any type of analysis that makes race “matter” through a showing of disparate impact and implicit bias.<sup>107</sup> Even when the laws have disparate impacts, facially neutral laws receive strict scrutiny only where there is a proven discriminatory intent.<sup>108</sup> As a result, the Court applies strict scrutiny not for plaintiffs of color but for white students who are denied admission to their favorite university.<sup>109</sup> This doctrine requires the state to be “blind” to race, and, thus, all “race-conscious” state actions are considered suspect, even if benign or intended to be helpful.<sup>110</sup> The meaning of the Fourteenth Amendment and Equal Protection is the subject of perennial debate in the judicial system,

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451–52 (2007) (stating that colorblindness in legal discourse, specifically Equal Protection doctrine, contends that “erasing race itself is key to eradicating racial effects,” which requires not “thinking and speaking about race”). See also Greg Toppo, *Growing Up ‘Post-Racial,’ Teens Suddenly Find a World That Isn’t: Protests in Ferguson, New York and Elsewhere Hit Home*, USA TODAY (Dec. 10, 2014), <http://www.usatoday.com/story/news/nation/2014/12/10/teen-attitudes-race-diversity-america/19749199/>.

106. Flagg, *supra* note 8, at 954 (“[T]he pursuit of colorblindness progressively reveals itself to be an inadequate social policy if the ultimate goal is substantive racial justice.”).

107. *Id.* at 955–56 (speaking to the fact that critical race theorists have “compellingly [argued] that race does and should matter in all aspects of the law, from legal doctrine to legal theory”). See also Richardson & Goff, *supra* note 72, at 119 (describing the fact that “hegemonic racial violence . . . is an inevitable and foreseeable consequence of current policing strategies, even in the absence of institutional and individual racial animus”); Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102 (2007) (demonstrating the importance of examining racial bias not as always being a purposeful decision but often an implicit one).

108. *Id.* at 954. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that a Fourteenth Amendment challenge requires discriminatory intent even when racial bias in sentencing can be demonstrated through statistical evidence).

109. See, e.g., *Schuetz v. BAMN*, 134 S. Ct. 1623, 1660 (2014); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 22 (Kimberlé Crenshaw et al., eds., 1995) (“Whites simply cannot envision the personal responsibility and the potential sacrifice inherent in Black’s conclusion that true equality for blacks will require the surrender of racism-granted privileges for whites.”); Sciallo, *supra* note 55, at 1398 (“We cannot expect whiteness to self-correct; it never has.”).

110. Harris, *supra* note 105, at 452. See also Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1176 (2008) (“Our politicians and courts laud the progress we have made towards becoming a ‘color-blind’ society, but in reality, they too often mistake ‘race-blindness’ with ‘racism blindness.’”); Obasogie, *supra* note 14, at 611.



including the debate between anti-subordination and anti-classification, as well as between formal and substantive equality.<sup>111</sup>

The all but complete foreclosure of Equal Protection for anti-subordination purposes began in 1976 with what is arguably one of the most important U.S. Supreme Court cases on race, *Washington v. Davis*.<sup>112</sup> In *Davis*, the Court held that in order to find a constitutional violation, plaintiffs had to “prove more than racial disparate impact”; they also had to show “discriminatory purpose.”<sup>113</sup> It appeared at first that Equal Protection was not completely dead because the Court held in part that a federalism issue was at stake and that they should “await legislative prescription.”<sup>114</sup> In other words, *Davis* held “that inquiry into disparate impact was *not required, but permitted* by constitutional guarantees of equality.”<sup>115</sup> This means that statutory disparate impact standards could have been devised at that point.<sup>116</sup> However, in 1979 the Court “vastly restricted the role that evidence of foreseeable disparate impact could play in proving discriminatory purpose in equal protection cases.”<sup>117</sup> In *Personnel Administrator of Massachusetts v. Feeney*, the Court stated that the lawmaker must have made a law “in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>118</sup>

This means that a plaintiff must have a “smoking gun” of discriminatory intent, such as an email where the lawmaker or law enforcement official spells out the fact that they intended to exclude

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111. Balkin & Siegel, *supra* note 10, at 10 (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”). See also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1063–64 (2011).

112. *Washington v. Davis*, 426 U.S. 229, 230 (1976); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987) (speaking to the fact that current Equal Protection doctrine “requires plaintiffs challenging the constitutionality of facially neutral law to prove a racially discriminatory purpose”).

113. *Davis*, 426 U.S. at 230.

114. *Id.* at 248.

115. Reva B. Siegel, *Race-Conscious But Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 661–62 (2015). See generally Richard Primus, *The Future of Disparate Impact*, MICH. L. REV. 1341, 1343 (2010).

116. Siegel, *supra* note 115.

117. *Id.* at 663.

118. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

or inflict consequences upon a certain group.<sup>119</sup> Hence, even if a policy or law has a disproportionate and disparate impact, it only matters whether that policy or law was designed with the intent and purpose to discriminate.<sup>120</sup> Post-racialism, colorblindness, and this limited sense of Equal Protection form a lens through which racialized events are understood.<sup>121</sup> This lens promotes an understanding of race and racism that erases and invisibilizes contemporary manifestations of racism and anti-racist struggles.<sup>122</sup> It obscures the fact that race “matters” and defines everything in society, particularly in the criminal justice system.<sup>123</sup>

Consequently, this allows for the impoverishment and emptiness of race-based remedies surrounding police-involved shootings.<sup>124</sup> The conflict between whether to acknowledge the role of race in contemporary society can be seen in the current U.S. Supreme Court, with Chief Justice John Roberts representing one side and Justice Sonia Sotomayor representing the other.<sup>125</sup> “Race matters,”

119. ALEXANDER, *supra* note 5, at 130 (“[T]o establish an equal-protection violation, one must prove *intentional* discrimination—conscious racial bias. Law enforcement officials rarely admit to having acted for racial reasons, leaving most victims without anyone to sue and without a claim that can be proven in a court of law.”).

120. Flagg, *supra* note 8, at 958 (“In constitutional law, facially race-neutral criteria of decision that carry a racially disproportionate impact violate the Equal Protection Clause only if adopted with a racially discriminatory intent.”).

121. See GEORGE LAKOFF, *THE ALL NEW DON’T THINK OF AN ELEPHANT!* 15 (2014) (“People think in frames . . . . If the facts do not fit the frame, the frame stays and the facts bounce off.”); CONSTABLE, *supra* note 47, at 134 (“Law acts through persuading hearers. The active engagements of speakers and hearers in dialogue transform states of affairs in their world.”).

122. See *id.*

123. Durant, *supra* note 5, at 176 (“The undebatable and undeniable answer to the most basic question of equal access to justice and fairness in the criminal justice system to all American citizens is a resounding ‘No.’”). See also Cho, *supra* note 105, at 1593; Obasogie, *supra* note 14, at 585 (describing the way that race is defined by “constitutive” and “iterative” social practices that have “encoded into individuals” certain views on race and the “world around them”). See generally Fields, *supra* note 14, at 101 (“Race is not an idea but an ideology.”).

124. WISE, *supra* note 105, at 16 (noting that since the late 1970s there has been a “de-emphasis of racial discrimination and race-based remedies for inequality”).

125. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007) (Chief Justice Roberts opining that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race”). See also Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N. C. L. REV. 1339, 1341–42 (“Colorblindness is exemplified by U.S. Supreme Court Chief Justice John Robert’s argument that the way to end racial inequality is to act as though race does not exist.”); William R. Yeomans, *The Politics of Civil Rights Enforcement*, 53 WASHBURN L.J. 509, 510 (2014) (“A majority of the U.S. Supreme Court seems intent on limiting efforts to

according to Justice Sotomayor, while to the Chief Justice it arguably does not.<sup>126</sup> Ultimately, the hegemonic understanding of racism in the U.S. precludes the examination of racially disparate impact and upholds only one sense of racism that is seen as actual, constitutionally impermissible racism: that which is direct and explicit.<sup>127</sup> Just like Justice Harlan's dissent in *Plessy v. Ferguson*, colorblindness masks and occludes the way racism functions in contemporary society, leaving those brutalized or killed by police with little to no room to articulate legally cognizable claims and leaving Equal Protection with little value.<sup>128</sup>

Last, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* represents a significant departure from existing Equal Protection jurisprudence.<sup>129</sup> The central holding of the majority opinion, delivered by Justice Kennedy, was that disparate-impact claims *are* cognizable under the Fair Housing Act ("FHA") for discriminatory housing practices.<sup>130</sup> Although *Texas Department of Housing and Community Affairs* addressed the FHA and housing discrimination, the opinion demonstrates the importance of applying the disparate impact standard in any and all fields of law in order to address the racist outcomes that occur regardless of whether a given law is itself explicitly racist.<sup>131</sup> This signals the possibility of a new legal era in which disparate impact claims can be viable means for

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remedy racial disparities."); Barnes & Chemerinsky, *supra* note 111, at 1065 ("[B]oth the Courts of Chief Justices Rehnquist and Roberts have significantly structured an equality jurisprudence that embraces racial equality as resting on race-neutral universalism.").

126. Schuette, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

127. See generally MICHEL FOUCAULT, *THE ORDER OF THINGS* xx (1970) ("The fundamental codes of a culture—those governing its language, its schemas of perception, its exchanges, its techniques, its values, the hierarchy of its practices—establish for every man, from the very first, the empirical orders with which he will be dealing and within which he will be at home.").

128. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting). See also WISE, *supra* note 105, at 18 ("[C]olorblindness not only fails to remedy discrimination and racial inequality, it can actually make both problems worse."); Tom I. Romero II, *The Keyes to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415, 435 (2015) ("It is no surprise . . . that the deaths of Michael Brown, Eric Garner, Tamir Rice, Trayvon Martin, and other young men of color by police officers or other others acting in positions of 'authority' have so fully exposed the fallacies of color-blindness of the post-racial United States.").

129. *Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Comm'tys. Project*, 135 S. Ct. 2507 (2015).

130. *Id.* at 2525.

131. *Id.*

plaintiffs of color to build cases in the fields of criminal justice, carceral, and policing.

### III. Constitutional Rights, the “Objectively Reasonable” Standard, and Police Use of Excessive Force

This section makes three arguments about current constitutional standards for policing and remedies for brutality. First, the value of “constitutional rights” is not inherent, and “rights” are circumscribed by the context in which they are materialized.<sup>132</sup> Second, current procedures for remedying constitutional violations involving police brutality and excessive use of force are inadequate.<sup>133</sup> Third, federal oversight of individual civil rights violations and of the constitutional violations by entire police departments represents an important mechanism for ensuring constitutional compliance but should not displace efforts to objectively prosecute individual officers.<sup>134</sup> Thus, Department of Justice (“DOJ”) investigations represent only one important solution to the intertwined problems of use of excessive force, implicit and explicit racial bias, and unconstitutional policing.

First, there is a problem with “rights.” Rights only matter when they are materialized and can constrain more radical tactics and demands.<sup>135</sup> Rights are only materialized when the system—the jury, grand jury, judge, etc.—recognizes and applies a set of facts to an ideal, an abstract conception of what that constitutional right is.<sup>136</sup> Constitutional and civil rights can be used as vehicles through which issues, disputes, and wrongs are articulated, but are subjected to and circumscribed by interpretation and application.<sup>137</sup> This is the

132. Tushnet, *supra* note 12, at 1363–64.

133. David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV 1199, 1199–1200 (2005).

134. Tierney Sneed, *Ferguson Report Prompts Resignations, Court Takeover*, U.S. NEWS (Mar. 11, 2015), <http://www.usnews.com/news/articles/2015/03/11/doj-ferguson-report-prompts-resignations-court-takeover>.

135. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 98 (1995) (“While rights may operate as an indisputable force of emancipation at one moment in history . . . they may become at another time a regulatory discourse, a means of obstructing or coopting more radical political demands, or simply the most hollow of empty promises.”).

136. RONALD DWORKIN, *LAW’S EMPIRE* 413 (1986) (“Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior . . . . Law’s attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice.”).

137. MICHAEL C. DORF & TREVOR W. MORRISON, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONSTITUTIONAL LAW* 41 (2010) (“[I]nterpretation of legal texts is an

dominant mode through which we think about rights, constitutionality, and ethics.<sup>138</sup> Rights, and rights discourse, have limitations: the historical conditions, social power, and discursive constraints surrounding a given right can limit and nullify the meaning and applicability of a right.<sup>139</sup> Rights are “unstable” and contingent and thus only matter insofar as the rights are enforced and wrongs are actually remedied.<sup>140</sup> If not protected, rights can remain as mere abstractions without any value.<sup>141</sup> Perhaps the problem with rights is not one of “rights-assertion” but instead the “failure of rights-commitment.”<sup>142</sup> From this point of view, “the problem with rights discourse is not that the discourse is itself constricting, but that it exists in a constricted referential universe.”<sup>143</sup> Either way, it is important how rights are applied.

Generally, the beginning of the modern civil rights era is marked by *Brown v. Board of Education*, which ushered in a new era of individualized relief, as well as the supremacy of the doctrine of “colorblindness.”<sup>144</sup> Civil and constitutional rights are controlled by the substantive constitutional adjudicative process, through which the U.S. Supreme Court expands or constrains the remedial and

inherently social exercise.”). See also Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 344 (“The central theme of the critique-of-rights literature is that the indeterminacy of constitutional rights makes them dependent on the social setting in which they’re enforced.”).

138. ALAIN BADIOU, *ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL* 4 (“‘Ethics’ is a matter of busying ourselves with these rights, of making sure they are respected.”). See generally CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 31 (1932) (“Words such as . . . sovereignty, constitutional state, absolutism . . . and so on, are incomprehensible if one does not know exactly who is to be affected.”).

139. ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 73 (2003) (explaining that one element of the “rights critique” is that “rights, when recognized, have inspired at best a false hope, and have ideologically served to obscure rather than illuminate the contours of a truly good and just state”). See also BROWN, *supra* note 133, at 99 (“Not only did bourgeois rights discourse mask by depoliticizing the social power of institutions such as private property or the family, it organized mass populations for exploitation and regulation, thus functioning as a modality of what Foucault termed ‘bio-power.’”).

140. Tushnet, *supra* note 12, at 1363–64.

141. *Id.* at 1364.

142. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 424 (1987).

143. *Id.*

144. Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 249 (1988) (noting that post-*Brown*, constitutional litigation has been primarily framed by “traditional notions of individualized relief,” as opposed to systemic relief). See also Rudovsky, *supra* note 133, at 1199–1200. See generally Yeomans, *supra* note 110, at 509.

enforcement measures for a given right.<sup>145</sup> Specifically, through a “series of complex and controversial measures,” the Court has diminished many key constitutional and civil rights, which has prompted police to conform to “sub-constitutional norms for remedies as opposed to substantive constitutional principles.”<sup>146</sup> The only way to give rights a substantive importance is to enforce them and provide redress when there is a deprivation. In effect, then, the legal system has reduced police accountability by making it very hard to make a successful claim.<sup>147</sup> Moreover, there is a theoretical and material problem with focusing on individual officers and individual grievances. It allows individual officers to face legal blame while a systemic problem is left unchallenged more broadly. The “few bad apples” theory must be acknowledged as deeply flawed.<sup>148</sup> This theory posits that only a few officers have issues and denies the existence of a generalized problem. Whenever police get off when they kill someone, it tells the entire policing system that such behavior is permissible and that some lives are worth less.

Until now, the focus has generally been only on the liability of individual officers, conforming to this overarching trend of individualized relief.<sup>149</sup> This focus on individual officers’ liability is exemplified in the constitutional and jurisprudential focus on 42 U.S.C. § 1983 suits and 18 U.S.C. § 242 prosecutions for remedying

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145. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 641–42 (1990) (“Conservative constitutionalism now dominates the Supreme Court, may soon dominate the federal judiciary, and has already profoundly shaped the constitutional law of the foreseeable future.”). See generally Earl M. Maltz, *The Prospects for a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 29–30 (2011).

146. Rudovsky, *supra* note 133, at 1200–01.

147. *Id.* at 1202. See also Dawn Van Hoek & Peter Jon Van Hoek, *Rights Without Remedies: The Dilution of the Bill of Rights*, 70 MICH. B.J. 1046, 1049 (“In the law, police do not have a lesser duty to observe fundamental rights, even though the courts have restricted the remedies available for violation of those protections.”).

148. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 464 (2004). See also Jay Stanley, *We Need to Move Beyond the Frame of the “Bad Apple Cop”*, ACLU (Mar. 19, 2015), <https://www.aclu.org/blog/criminal-law-reform-free-speech-immigrants-rights-technology-and-liberty/we-need-move-beyond-fr>.

149. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3190–91 (2014) (“For much of American history, courts and legislative bodies have fought against police misconduct by using minimally invasive regulatory tools, like evidence exclusion, criminal prosecution, and civil litigation. Around the end of the twentieth century, a growing number of legal academics agreed that these existing regulatory mechanisms were insufficient.”).

police violence and brutality.<sup>150</sup> In 1961, the Supreme Court brought back § 1983 suits in *Monroe v. Pape*.<sup>151</sup> Section 1983 is the popular name for the Civil Rights Act of 1871, which establishes a “tort-like remedy” for deprivations of federally protected rights.<sup>152</sup> Section 1983 provides a remedy for the deprivation of rights secured by the U.S. Constitution or federal law, while § 242 allows for criminal prosecutions against government officials, including police.<sup>153</sup> The Supreme Court developed the § 1983 civil suit as a way for citizens to enforce constitutional rights and to thereby manage the use of deadly force.<sup>154</sup> Constitutionally, these civil and criminal remedies are framed as part of Fourth Amendment protections insofar as they claim excessive, unreasonable force during a search or arrest.<sup>155</sup> However, § 1983 suits and § 242 prosecutions have had limited success in diminishing police brutality.<sup>156</sup> Throughout this process, the courts and the Federal Constitution can indeed be important mechanisms for providing meaningful remedies to victims of police misconduct.<sup>157</sup> However, the judiciary cannot address this problem

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150. 42 U.S.C. § 1983 (2012) (providing that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”). 42 U.S.C. § 242 (2012) provides that “whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].”

151. *Monroe v. Pape*, 365 U.S. 167 (1961). See also Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 617 (1997) (“The growth of damage remedies for constitutional violations in the decades following *Monroe v. Pape* has encouraged litigants to frame their cases as breaches of the Constitution.”); Rudovsky, *supra* note 133, at 1207.

152. Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 182 (2012).

153. Armacost, *supra* note 146, at 464–65.

154. Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 392 (2008).

155. Armacost, *supra* note 146, at 465.

156. *Id.* at 464. See also Felstiner et al., *supra* note 38, at 632 (speaking to the way in which “too little conflict surfaces in our society,” that there are a multitude of conflicts and disputes that go unresolved, wherein “too few wrongs are perceived, pursued, and remedied”).

157. Harmon, *supra* note 67, at 768. See generally James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 394 (2003) (critiquing monetary damages as the primary remedy for constitutional tort actions because “damages do not have a deterrent effect and may even have the detrimental effect of keeping courts from expanding individual rights”).

alone.<sup>158</sup> Ultimately, the remedies question is also contingent on whether the “legal response to police abuse is sufficiently sensitive to the institutional nature of the problem.”<sup>159</sup> Remedies are only effective if they are costly for police departments and cities; as long as this leverage exists, there is potential that those entities will conform to constitutional guarantees.<sup>160</sup>

The practically sole focus on the “cost of unconstitutional behavior” has created a system where, as long as the police department can afford the cost, there is no real leverage over that department to prevent constitutional violations.<sup>161</sup> Further, examining only whether civil or constitutional rights have been violated forecloses an analysis of the myriad complexities of regulating the police and limits the structural and systemic analyses of police violence.<sup>162</sup> This requires a reevaluation of the assessment framework for “balancing individual and societal interests” and a reconfiguration of what circumstances police “should,” instead of “may,” “harm individual interests for the greater good.”<sup>163</sup> Thus, that constitutional rights delineate what police cannot do is not enough; in order to ensure accountability and a balance between individual and societal interests, there should also be a way to signal what police *ought* to be doing.<sup>164</sup> In the end, constitutional rights can “establish only deferential minimum standards for law enforcement,” and they fail to address “aggregate or distributional costs and benefits of law enforcement or its effects on societal quality of life.”<sup>165</sup> Thus, narrow legal reform, aimed at changing existing laws or ensuring the creation or enforcement of legal rights, can be a process of management and

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158. *Id.*

159. David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 467 (1992).

160. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 34 (2012). See Park, *supra* note 137, at 394 (“We can imagine a world where the Constitution is enforced not via a federal damages action, but only through other remedies such as structural injunctions, declaratory judgments, judicial review, the exclusionary rule, and the writ of habeas corpus.”).

161. Rushin, *supra* note 149, at 3191.

162. Harmon, *supra* note 67, at 768.

163. *Id.* at 776.

164. Harmon, *supra* note 67, at 763, 777 (“Constitutional criminal procedure rights are therefore commands about what the police cannot do, not standards for what they should do.”).

165. *Id.* at 785 (arguing that current “constitutional law makes the politics of criminal justice worse: more punitive, more racist, and less protective of individual liberty”).



an attempt at producing a docile public, without actually addressing underlying issues.<sup>166</sup>

That Darren Wilson was never indicted for the killing of Michael Brown is representative of the ways in which the system is flawed.<sup>167</sup> A “local prosecutor with strong family connections to police” and “biased legal and ethical decisions in the investigation and prosecution” both contributed to the failure to indict and revealed a system that was flawed from the outset.<sup>168</sup> Wilson could have faced anything from first-degree murder (least likely at that point) to voluntary manslaughter (most likely) but ended up facing no charges at all.<sup>169</sup> The other avenue that was a proposed solution and remedy for the death of Michael Brown was federal civil rights charges against Wilson.<sup>170</sup> Federal intervention and investigation were supposed to offer some semblance of an objective process, at least as compared to the local prosecution and grand jury process in Ferguson. Nonetheless, the Department of Justice did not charge Darren Wilson with federal civil rights charges.<sup>171</sup>

The relevant standard that the DOJ applied was 18 U.S.C. § 242, discussed above.<sup>172</sup> Under § 242, the DOJ found that the use of force

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166. SPADE, *supra* note 12, at 89 (“The neoliberal reframing of discrimination and violence that have drastically shifted and undermined strategies of resistance to economic exploitation and state violence produce this narrow law reform agenda.”); AGAMBEN, *supra* note 102, at 26 (“[T]he development and triumph of capitalism would not have been possible . . . without the disciplinary control achieved by the new bio-power, which, through a series of appropriate technologies, so to speak, created the ‘docile bodies’ that it needed.”).

167. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

168. Jeff Adachi, *SF Public Defender’s Statement on Grand Jury Decision*, SF PUBLIC DEFENDER (Nov. 26, 2014), <http://sfpublicdefender.org/news/2014/11/sf-public-defenders-statement-on-grand-jury-decision/>.

169. Boer Deng et al., *Ferguson FAQ: What Charge Is Darren Wilson Facing and Other Questions Answered*, SLATE (Aug. 19, 2014), [http://www.slate.com/blogs/the\\_slatest/2014/08/19/ferguson\\_faq\\_what\\_charge\\_is\\_darren\\_wilson\\_facing\\_breaking\\_down\\_a\\_confusing.html](http://www.slate.com/blogs/the_slatest/2014/08/19/ferguson_faq_what_charge_is_darren_wilson_facing_breaking_down_a_confusing.html).

170. Sari Horwitz, *Justice Department Clears Ferguson Police Officer in Civil Rights Probe*, WASH. POST (Mar. 4, 2015), [http://www.washingtonpost.com/world/national-security/justice-dept-review-finds-pattern-of-racial-bias-among-ferguson-police/2015/03/03/27535390-c1c7-11e4-9271-610273846239\\_story.html](http://www.washingtonpost.com/world/national-security/justice-dept-review-finds-pattern-of-racial-bias-among-ferguson-police/2015/03/03/27535390-c1c7-11e4-9271-610273846239_story.html).

171. Bill Chappell, *Ferguson Report: Former Officer Won’t Face Civil Rights Charges*, NPR (Mar. 4, 2015), <http://www.npr.org/blogs/thetwo-way/2015/03/04/390713944/ferguson-report-justice-dept-says-wilson-won-t-face-civil-rights-charge>.

172. U.S. DEP’T OF JUSTICE, *supra* note 11, at 9.

by Wilson against Brown was not objectively unreasonable.<sup>173</sup> The Supreme Court established the standard applied by the DOJ in 1989.<sup>174</sup> In *Graham v. Connor*, Chief Justice Rehnquist wrote for the majority, holding that the reasonableness analysis under the Fourth Amendment looks only at whether an officer’s actions were “objectively reasonable” under the circumstances.<sup>175</sup> This analysis contains no “intent or motivation” element.<sup>176</sup> However, “objectively unreasonable” is a very high bar that gives police “considerable leeway,” potentially way too much leeway.<sup>177</sup> Moreover, under *Screws v. United States*, the federal standard requires that the government prove that the officer acted “for the specific purpose of violating the law.”<sup>178</sup> This raises the bar even higher and requires that Wilson “acted willfully” with the purpose to violate Brown’s rights.<sup>179</sup>

Hence, deadly force is constitutionally permissible when an officer has “probable cause to believe that [a] suspect pose[s] a threat of serious physical harm, either to the officer or to others.”<sup>180</sup> The primary evidence that Brown supposedly posed a threat was the fact that Wilson shot Brown in the hand while Brown attempted to gain control of Wilson’s gun.<sup>181</sup> Medical examiners’ reports and witness testimony that Brown was facing Wilson when the officer fired several more times, including the shot to the top of Brown’s head, were also important evidence.<sup>182</sup> The DOJ found that the evidence established that it was not unreasonable to perceive Brown as a “threat” because Brown “had attempted to take his gun [according to

173. *Id.* at 10.

174. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). See THE SENTENCING PROJECT, *supra* note 6, at 21.

175. *Graham*, 490 U.S. at 397. See also Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 120 (2009).

176. *Graham*, 490 U.S. at 397.

177. THE SENTENCING PROJECT, *supra* note 6, at 21.

178. *Screws v. United States*, 325 U.S. 91, 101-07 (1945) (speaking to the fact that § 242 has a willfulness requirement).

179. U.S. DEP’T OF JUSTICE, *supra* note 11, at 11.

180. *Id.* at 10. See *Tenn. v. Garner*, 471 U.S. 1, 11 (1985).

181. U.S. DEP’T OF JUSTICE, *supra* note 11, at 11.

182. *Id.* See also Eyder Peralta, *Ferguson Documents: What Michael Brown’s Friend Saw*, NPR (Nov. 26, 2014), <http://www.npr.org/blogs/thetwo-way/2014/11/26/366827836/ferguson-documents-what-michael-browns-friend-saw> (speaking to the fact that there other “credible” witnesses there who saw events occur differently, including the view that Wilson was the “aggressor”).

Wilson's own account of the events] and [Wilson] suspected that Brown might have been part of a theft a few minutes before."<sup>183</sup>

However, this process of deciding who is a threat and who is not is not a neutral one.<sup>184</sup> This process of threat identification is complicated by the fact that police make quick decisions that are based on implicit racial bias and a "suspicion heuristic" that functions as a "mental shortcut that often leads to systematic errors in determining who is and is not suspicious."<sup>185</sup> Wilson's decision that Brown was suspicious and ultimately a threat involved a normative and intentional, as well as implicit, process of determining "criminality" that should be taken into account when the judicial system judges an officer's actions.<sup>186</sup> Thus, even though the investigation into Wilson's actions yielded no charges, one should not conclude from that outcome that Wilson in fact did not "violate" Brown's rights. This outcome could instead signify a problem with the "objectively reasonable" standard itself.

While the "objectively reasonable" standard may be flawed at least in part due to implicit bias, the DOJ's investigation into the Ferguson police department did yield results. Despite not charging Wilson, the Justice Department *did* find that the Ferguson police department had engaged in "a pattern of unconstitutional policing."<sup>187</sup> The investigation uncovered a pattern or practice of violations of the First Amendment (retaliation on protected expression), Fourth Amendment (stops without reasonable suspicion and arrests without probable cause), and Fourteenth Amendment (discriminatory intent

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183. *Id.* at 10–12 ("There is no credible evidence to refute Wilson's stated subjective belief that he was acting in self-defense.").

184. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 299 (2015) ("In the real world of policing, bias in its derogation and favoritism forms operate simultaneously to skew how events and people are perceived."). See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

185. Richardson & Goff, *supra* note 77, at 297.

186. *Id.* at 296. See also BUTLER, *supra* note 72, at 8 ("And so, prior to sensing anything at all, I am already in relation not only to one particular other, but to many, to a field of alterity that is not restrictively human. Those relations form a matrix for subject formation, which means that someone must first sense me before I can sense anything at all.").

187. Chappell, *supra* note 169. See also Ta-Nehisi Coates, *The Gangsters of Ferguson*, THE ATLANTIC (Mar. 5, 2015), <http://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/> ("Justice in Ferguson is not a matter of 'racism without racists,' but racism with racists so secure, so proud, so brazen that they used their government emails to flaunt it.").

motivating practices).<sup>188</sup> Ferguson is a starkly racialized place, as the city itself is sixty-seven percent black and the police force, mostly from out of town, is eighty-three percent white.<sup>189</sup> Moreover, five of six council members and the mayor are all white.<sup>190</sup> The oversight that the federal government exercised here in calling for local reform is based on 42 U.S.C. § 14141, which declares that it is unlawful for governmental bodies to “engage in a pattern or practice of unlawful conduct by law enforcement officers.”<sup>191</sup> Section 14141 is the counterpart to § 242, with the former addressing patterns of unconstitutional behavior by an entire department, and the latter addressing investigation of individual officers.<sup>192</sup> Hence, as discussed below, federal oversight is one important mechanism for ensuring compliance with constitutional standards, on both a departmental and individual scale.

#### IV. Constitutional Limits: Specific and Broad Reforms

Based on the problems outlined in previous sections, this note proposes that finding a real solution to the current crisis of policing requires not only superficial, narrow legal reforms but also consideration of how the criminal justice system and current Equal Protection jurisprudence inhibit substantive reform.<sup>193</sup> The traditional remedial framework for police misconduct focuses on deterring officers from committing more constitutional violations by emphasizing punishment for offending officers, making the victim whole again, and requiring that police departments conform their

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188. U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015).

189. Jonathan Capehart, *Three Troubling Things Exposed By the Ferguson Police Shooting of Michael Brown*, WASH. POST (Sept. 5, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/09/05/three-troubling-things-exposed-by-the-ferguson-police-shooting-of-michael-brown/>. See also Scott Neuman, *Ferguson Mayor: Police Will Recruit More Minorities*, NPR (Nov. 30, 2014), <http://www.npr.org/blogs/thetwo-way/2014/11/30/367548761/ferguson-largely-peaceful-after-officers-decision-to-quit> (although this type of action has the possibility of decreasing police violence, it is not a strategy to be relied on because increasing police of color on a police force does not necessarily mean they will operate any differently than white cops and sometimes act more hostile toward communities of color).

190. *Id.*

191. 42 U.S.C. § 14141(a); U.S. DEP’T OF JUSTICE, *supra* note 188, at 1 (investigation “initiated under the pattern-or-practice provision of the Violent Crime Control and Law Enforcement Act of 1994.”).

192. Rushin, *supra* note 149, at 3202-03.

193. SPADE, *supra* note 12, at 89.

actions and policies with constitutional mandates.<sup>194</sup> However, regulating policing goes beyond the scope of constitutional criminal procedure, so it is inadequate to consider solutions only in terms of formal, constitutional rights, without examining structural reform as well.<sup>195</sup> Individualizing, isolating, and fragmenting systemic patterns of officer-involved killings limits the means for providing a remedy, as well as the means for preventing it from happening again.

First, the deaths of Mike Brown, Eric Garner, Sam DuBose, and all of the others killed by police indicate “the need for better police practices and improve[d] accountability.”<sup>196</sup> Second, because of the monitoring, surveillance, and over-policing of low-income communities of color, a solution also requires “revising policies that place people of color under greater police scrutiny and that lead to their disadvantage throughout the criminal justice system.”<sup>197</sup> In the months directly following the killings of Mike Brown and Eric Garner, the central solutions to police killings and brutality included launching federal civil rights cases, equipping more officers with body cameras, and reviewing the grand jury system.<sup>198</sup> As police violence continues unabated in 2015, many are calling for broad and comprehensive changes to contemporary policing.<sup>199</sup>

194. Harmon, *supra* note 160, at 33.

195. Harmon, *supra* note 67, at 763. See Bell, *supra* note 109, at 22 (describing the principle of “interest convergence” as a foundation for the idea that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites”). See generally Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/> (“An America that looks away is ignoring not just the sins of the past but the sins of the present and the certain sins of the future.”).

196. THE SENTENCING PROJECT, *supra* note 6, at 4; CAMPAIGN ZERO, *supra* note 13.

197. *Id.* See generally CRITICAL RESISTANCE, *supra* note 7 (speaking to the fact that, for example, “Oakland youth need access to recreational programs, employment, and education, not more contact with law enforcement”).

198. Bell, *supra* note 109, at 22 (“Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle- and upper-class whites.”). See also Eli Yokley, *In Ferguson, Push for Criminal Justice Reform Draws Comparisons to ‘60s Fight for Civil Rights*, N.Y. TIMES (Jan. 18, 2015), <http://www.nytimes.com/2015/01/19/us/in-ferguson-push-for-criminal-justice-reform-draws-comparisons-to-60s-fight-for-civil-rights.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article>.

199. CAMPAIGN ZERO, *supra* note 13. See also Jon Swaine, Lauren Gambino & Oliver Laughland, *Protesters Unveil Demands for Stricter US Policing Laws as Political Reach Grows*, THE GUARDIAN (Aug. 21, 2015), <http://www.theguardian.com/us-news/2015/aug/21/protesters-unveil-police-policy-proposals>.

Many of the proposed solutions, except for those involving recent technological advances, are not actually new. For example, the Obama administration’s promise of a federal response in recent cases is similar to how the Bush administration mobilized the Justice Department to investigate a federal civil rights violation during the Rodney King incident.<sup>200</sup> In reference to the discussions above regarding Equal Protection and the limits on constitutional remedies, this section will focus primarily on solutions outlined by the Sentencing Project, the President’s Task Force on 21st Century Policing, and Campaign Zero, among others.<sup>201</sup>

The President’s Task Force offers a more institutional and less radical perspective than the Sentencing Project yet ultimately provides some thematically similar suggestions.<sup>202</sup> According to the Interim Report of the President’s Task Force, contemporary policing must concentrate on six “pillars” in order to improve community relations: (1) building trust and legitimacy; (2) policy and oversight; (3) technology and social media; (4) community policing and crime reduction; (5) training and education; and (6) officer wellness and safety.<sup>203</sup> The Interim Report calls for “procedurally just behavior” based on four principles, including treating people with dignity and respect, giving individuals a voice in encounters, remaining neutral and transparent, and conveying trustworthy motives.<sup>204</sup>

Similarly, according to the Sentencing Project, there are four components required to ensure that police departments employ “best practices” aimed at reducing racial disparities in policing and the use of fatal force.<sup>205</sup> These four components are (1) changing policies and laws that have a disparate racial impact (e.g., the Fair Sentencing Act of 2010 mostly fixed the racialized difference between crack and powder cocaine sentences); (2) formally acknowledging implicit racial

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200. Paul Hoffman, *The Feds, Lies, and Videotape: The Need For An Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CALIF. L. REV. 1453, 1489 (1993).

201. CAMPAIGN ZERO, *supra* note 13.

202. THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 96.

203. *Id.* at iii.

204. THE SENTENCING PROJECT, *supra* note 6, at 7. *But see* Ashoka Jegroo, *Meet the New Group That Wants to Disarm and Displace the NYPD*, WAGING NONVIOLENCE (Mar. 26, 2015), <http://wagingnonviolence.org/2015/03/meet-new-group-wants-disarm-displace-nypd/> (“A newly-formed group of activists are teaming up with Copwatch, an anti-police brutality group that records video of police conduct in their communities, to create ‘no-cop zones,’ and maybe even disarm the police, through the use of direct action.”).

205. *Id.* at 19.

bias within the criminal justice system, from police to prosecutors to jurors; (3) increasing availability of and access to alternatives to incarceration that reduce the disadvantage to low-income people of color in the justice system; and (4) ensuring that the justice system does not exacerbate the socioeconomic conditions that compel individuals to engage in activities that lead to entanglement in the system.<sup>206</sup> These four components comprise a strategy for addressing not only individual pieces of the problem of police killings, but also the structural issues in the criminal justice system as a whole that lead to a decrease in equality and an increase in subordination and racially disparate impacts.<sup>207</sup>

Campaign Zero articulates a number of similar methods for producing “a world where police don’t kill people by limiting police interventions, improving community interactions, and ensuring accountability.”<sup>208</sup> These suggestions are comparable to those provided by the Sentencing Project: ending “broken windows” policing, increasing community oversight, decreasing the use of force, independently investigating and prosecuting officers, increasing community representation, allowing people to film police, using body cameras, training police differently, ending “for-profit” policing, demilitarizing police forces, and ensuring fair police union contracts.<sup>209</sup>

As emphasized by the Sentencing Project’s first of four components, it is important to identify policies that have disparate racial impacts and to adopt new policies and laws that diminish those impacts.<sup>210</sup> This solution offers a way around the jurisprudential limitations placed on Equal Protection by changing the policies that do have clear, racially disparate impacts. The first example of this type of change at the local level is regarding “stop and frisk,” or *Terry* stops, which are supposed to be “brief, non-intrusive police stop[s] of a suspect.”<sup>211</sup> Such stops require only reasonable suspicion and have

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206. *Id.* at 19–25.

207. *Id.*

208. CAMPAIGN ZERO, *supra* note 13.

209. CAMPAIGN ZERO, *supra* note 13. See also Daniel Denvir, *The Danger in Recording a Cop*, CITYLAB (Aug. 20, 2015), [http://www.citylab.com/crime/2015/08/still-dangerous-record-police-america/401795/?utm\\_source=SFFB](http://www.citylab.com/crime/2015/08/still-dangerous-record-police-america/401795/?utm_source=SFFB) (discussing the current limitations, and vagaries, of filming cops); THE SENTENCING PROJECT, *supra* note 6, at 7.

210. *Id.* See also CAMPAIGN ZERO, *supra* note 16; THE SENTENCING PROJECT, *supra* note 6, at 7.

211. See generally Legal Information Institute, *Stop and Frisk*, CORNELL UNIVERSITY LAW SCHOOL, [http://www.law.cornell.edu/wex/stop\\_and\\_frisk](http://www.law.cornell.edu/wex/stop_and_frisk); Daniel Bergner, *Is Stop-*

been critiqued as unconstitutional and largely based on racial profiling.<sup>212</sup> As mentioned in Part II, “stop and frisk” encounters (*Terry stops*) as used by the NYPD resulted in extremely racially disproportionate statistics in terms of who was stopped.<sup>213</sup> A federal judge described the “stop and frisk” program in New York as “indirect racial profiling,” and Mayor Bill de Blasio cut it back considerably.<sup>214</sup>

A second example of policies that have disparate racial impacts is at the federal level. The Fair Sentencing Act of 2010 reduced the weight disparity between crack and powder cocaine from 100:1 to 18:1, with that amount determining whether a mandatory minimum sentence applies.<sup>215</sup> These two changes exemplify the types of best practices that reduce racial inequities in the criminal justice system by identifying and amending policies and laws that produce a racially disparate impact.<sup>216</sup> Changes in policy and the law around the “War on Drugs” (including Proposition 47 in California) and around sentencing and incarceration, generally, (such as the Smarter Sentencing Act) will have an important impact by reducing the over-policing and over-incarcerating of communities of color.<sup>217</sup>

The Sentencing Project’s second component addresses implicit racial bias, as well as excessive use of force and the ways in which the

*and-Frisk Worth It?*, THE ATLANTIC (Apr. 2014), <http://www.theatlantic.com/features/archive/2014/03/is-stop-and-frisk-worth-it/358644/>.

212. *Id.*; Richardson & Goff, *supra* note 72, at 119 (Stop-and-frisk tactics “create an environment that nurtures the unconscious racial biases and self-threats that can lead even consciously egalitarian officers to be more likely to use force disproportionately against black suspects.”).

213. The Editorial Board, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html> (about eighty-three percent of stops were of black or Latino New Yorkers from 2004 to 2012). *See generally*, ACLU, *Stop-and-Frisk Data*, <http://www.nyclu.org/content/stop-and-frisk-data>.

214. THE SENTENCING PROJECT, *supra* note 6, at 19.

215. *Id.* *See also* Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241, 241–42 (2014) (describing the original Anti-Drug Abuse Act of 1986, and other legislation, that criminalized crack more than powder cocaine).

216. *Id.*

217. Baker, *supra* note 48 (“Game-changing policies like Prop 47, which passed in November in California, will begin to take the wind out of the War on Drugs, as many nonviolent crimes in the Golden State are reduced to misdemeanors.”). *See also* CAMPAIGN ZERO, *supra* note 16 (“A decades-long focus on policing minor crimes and activities—a practice called Broken Windows policing—has led to the criminalization and over-policing of communities of color and excessive force in otherwise harmless situations.”).



two are interconnected.<sup>218</sup> First, implicit racial bias offers another way to address the jurisprudential limitations placed on Equal Protection discussed in Part II by acknowledging the ways in which implicit or unintentional racial bias affects all actors in the criminal justice system.<sup>219</sup> It is essential to include an analysis of the implicit racial bias that exists in the criminal justice community, including jury members and police.<sup>220</sup> The notion that an implicit bias operates within police forces complicates the amount of leeway police should be given under the “objectively reasonable” standard.<sup>221</sup> Thus, police department training should aim to mitigate implicit biases and restructure thinking around how and with whom officers choose to engage.<sup>222</sup>

Second, stopping the excessive use of force requires establishing clear guidelines.<sup>223</sup> There should be “comprehensive policies on the use of force” that include continuous training and data collection.<sup>224</sup> Training should include exercises like “shoot/don’t shoot scenarios,” how and when to use less than lethal weapons, and de-escalation techniques.<sup>225</sup> For example, the Austin Police Department’s use of force policy has “clear deadly force and less-lethal force guidelines, extensive police training in all force options, and an early warning system for identifying problem officers.”<sup>226</sup> This policy indicates the importance of identifying officers who cause problems and preventing them from transferring to different departments to avoid removal.<sup>227</sup>

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218. THE SENTENCING PROJECT, *supra* note 6, at 21.

219. Richardson & Goff, *supra* note 72, at 121 (“Research demonstrates that [implicit racial biases] can cause individuals to interpret identical facial expressions as more hostile on black faces than on white faces, and to perceive identical ambiguous behaviors as more aggressive when engaged in by blacks as opposed to whites.”).

220. THE SENTENCING PROJECT, *supra* note 6, at 21. See also WISE, *supra* note 105, at 19 (“In the final analysis, the problem with colorblindness and post-racial liberalism is that they ignore the different ways in which we experience the society around us.”).

221. *Id.*

222. THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 96, at 8–9. See also Smith, *supra* note 184, at 312 (“Implicit bias training is not a panacea. It is, however, a useful first step. To determine how useful, and to understand how much to expect from reforms that focus on reducing implicit bias, more research is needed.”).

223. THE SENTENCING PROJECT, *supra* note 6, at 21; CAMPAIGN ZERO, *supra* note 16.

224. THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 96, at 21.

225. *Id.*

226. THE SENTENCING PROJECT, *supra* note 6, at 21.

227. *Id.*

Other important elements for review of excessive force include the use of special prosecutors, civilian review boards, and body cameras.<sup>228</sup> First, there is a clear conflict of interest when a local prosecutor is prosecuting officers with whom he or she works alongside daily.<sup>229</sup> It is clear that the prosecutor’s relationship with officers was one of the problems with the grand jury in Missouri. Appointing a special prosecutor was possible in Ferguson and might have provided for a more objective process.<sup>230</sup> A special prosecutor can handle police misconduct cases from a more objective viewpoint.<sup>231</sup> Second, in the event that the public files a complaint, an independent civilian review board should be able to access information and evidence in order to discipline officers when the board finds a violation.<sup>232</sup> Third, body cameras that are worn by officers seek to decrease the use of excessive force by increasing accountability and transparency.<sup>233</sup> A study cited by the President’s Task Force on Policing found that when officers wore body cameras, there were nearly ninety percent fewer incidents of use of force and fifty-nine percent fewer complaints, as compared to officers without cameras.<sup>234</sup> Still, there are doubts about the effectiveness of body cameras and whether they actually reduce excessive force and increase officer accountability.<sup>235</sup> Research on body cameras is thus

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228. *Id.*

229. *Id.*

230. Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision*, COLUMBIA LAW SCHOOL (Dec. 5, 2014), [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2014/november/2014/Facts-on-Ferguson-Grand-Jury](http://www.law.columbia.edu/media_inquiries/news_events/2014/november/2014/Facts-on-Ferguson-Grand-Jury).

231. THE SENTENCING PROJECT, *supra* note 6, at 21.

232. *Id.*

233. See David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) As Tools For Ensuring Fourth Amendment Compliance By Police*, 43 TEX. TECH L. REV. 357 (2010). See also Tal Kopan, *Feds Release Guidance on Police Body Cameras*, POLITICO (Sept. 12, 2014), <http://www.politico.com/blogs/under-the-radar/2014/09/feds-release-guidance-on-police-body-cameras-195385.html> (“Body-worn cameras on police officers can increase accountability of police and improve evidence gathering.”).

234. THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 96, at 32.

235. THE SENTENCING PROJECT, *supra* note 6, at 21; CAMPAIGN ZERO, *supra* note 16 (“While they are not a cure-all, body cameras and cell phone video have illuminated cases of police violence and have shown to be important tools for holding officers accountable. Every case where a police officer has been charged with a crime for killing a civilian this year has relied on video evidence showing the officer’s actions.”).

“limited and mixed.”<sup>236</sup> Nonetheless, many departments are implementing body cameras, including the LAPD.<sup>237</sup>

The third and fourth components suggested by the Sentencing Project are interconnected and deal with targeting the ways in which people become entangled in the criminal justice system, and how policing tactics can aggravate this. The third component addresses using resources for alternatives to incarceration and decreasing the financial costs for defendants, both of which diminish disadvantages that low-income people of color face.<sup>238</sup> This suggestion includes pretrial release (e.g., in 2014 New Jersey changed its bail system and is now based on risk assessment rather than monetary bail) and increasing access to alternatives to incarceration (such as using treatment programs or electronic monitoring, as well as adopting graduated sanctions for probation violations).<sup>239</sup> The fourth component focuses on ways that the criminal justice system can exacerbate socioeconomic inequality.<sup>240</sup> It calls for channeling funding toward drug treatment and social programs that assist people in staying out of the system, instead of incarceration.<sup>241</sup> These reforms are all qualities of a police force that intertwine with what some scholars label as “community policing.” Community policing aims to ensure that policing emphasizes “the social work aspects of policing” and that “officers and communities work closely to address the underlying causes of crime and disorder.”<sup>242</sup> For example, the Center for Policing Equity at UCLA works with police departments to train police on equity issues, including testing “officers for psychological profiles” and comparing those profiles to racial bias in the stops they

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236. *Id.*

237. Kate Mather, *LAPD Expects to Start Deploying Body Cameras This Summer*, L.A. TIMES (Mar. 31, 2015), <http://www.latimes.com/local/lanow/la-me-ln-lapd-body-cameras-20150331-story.html>.

238. THE SENTENCING PROJECT, *supra* note 6, at 23.

239. *Id.*

240. *Id.* at 25. See also CRITICAL RESISTANCE, *supra* note 7 (urging local leaders in Oakland to “invest in what we know works—stable and safe housing, meaningful employment at a living wage, quality education and youth programming, and an investment in people over policing”).

241. *Id.*

242. Richardson & Goff, *supra* note 72, at 143–44. See also Karsten Moran, *In New York, Testing Grounds for Community Policing*, N.Y. TIMES (Aug. 23, 2015), <http://www.nytimes.com/2015/08/24/nyregion/for-new-york-police-a-radical-change-for-queens-residents-a-step.html> (reporting that in an effort to “reshape everyday interactions between its patrol officers and residents,” the NYPD is attempting to practice a form of “community policing,” focusing on solving problems, not merely enforcing the law).

conduct and the complaints made about them.<sup>243</sup> The focus here is on prevention of crime, not “law and order.”<sup>244</sup>

Indeed, even the President’s Task Force recognized that investigating the criminal justice system and policing also requires an “investigation into how poverty, lack of education, mental health, and other social conditions cause or intersect with criminal behavior.”<sup>245</sup> The results of these types of investigations can be seen in California. For example, in November 2014, California approved Proposition 47, reclassifying low-level offenses from felonies to misdemeanors and allowing the state to reallocate money from prisons to other programs, such as mental health and substance abuse programs.<sup>246</sup> Similar measures include “Ban the Box” initiatives, which remove the question about conviction history on job applications that places those who have been involved with the criminal justice system at a disadvantage.<sup>247</sup> Moreover, with events such as the Bipartisan Summit on Criminal Justice Reform coming up in 2015, it seems that perhaps this is the time for an overhaul of the criminal justice system.<sup>248</sup>

## V. Conclusion: The Fire Next Time<sup>249</sup>

In every era, it is important to acknowledge the depth and latitude of the tactics necessary to achieve long lasting change.<sup>250</sup> The riots and rebellions that occurred across the U.S. during 2014 and

243. Center for Policing Equity, *What We’ve Done*, <http://cpe.psych.ucla.edu/what-weve-done> (last visited Sept. 29, 2015).

244. *Id.*

245. THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 96, at 3.

246. THE SENTENCING PROJECT, *supra* note 6, at 25.

247. *Id.* See also Coates, *supra* note 102 (“The American population most discriminated against is also its most incarcerated—and the incarceration of so many African Americans, the mark of criminality, justifies everything they endure after.”)

248. Alex Altman, *Will Congress Reform the Criminal Justice System?*, TIME (Mar. 26, 2015), <http://time.com/3760310/criminal-justice-reform/>; Alex Lichtenstein, *Mass Incarceration Has Become the New Welfare*, THE ATLANTIC (Sept. 16, 2015), <http://www.theatlantic.com/politics/archive/2015/09/mass-incarceration-has-become-the-new-welfare/404422/> (“Mass incarceration is not just (or even mainly) a response to crime, but rather a perverse form of social spending that uses state power to address a host of social problems at the back end, from poverty to drug addiction to misbehavior in school.”).

249. See JAMES BALDWIN, *THE FIRE NEXT TIME* (1963).

250. Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 723 (2003); CRITICAL RESISTANCE, *supra* note 7 (“We don’t need the police to facilitate our anger nor do we need the courts to pretend to be neutral arbiters of justice.”).

2015 are nothing new.<sup>251</sup> The deaths of Mike Brown and Eric Garner represent two in a long history of black Americans who have been brutally killed, executed, lynched, and incarcerated through legal mechanisms.<sup>252</sup> The explosion of power and solidarity seen in Ferguson, Baltimore, and around the country, represents more than just a desire to prosecute the police who killed Mike Brown, Eric Garner, or Freddie Gray.<sup>253</sup> The protests were, and are, about the specific loss of those individuals but also about broader political needs, social stratification and subordination, and the continuity of racism.<sup>254</sup> Thus, the narrow legal reforms discussed throughout this

251. GILMORE, *supra* note 79, at 24 (noting that the urban riots of the 1960s “were protests against a long, dismal history of racial discrimination, segregation, unemployment, and blight, economic as well as social”). See also Virginia Postrel, *The Consequences of the 1960’s Race Riots Come Into View*, N.Y. TIMES (Dec. 30, 2004), <http://www.nytimes.com/2004/12/30/business/30scene.html> (between 1964 and 1971, there were upwards of 750 riots); NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* 372 (2010).

252. See, e.g., Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> (“Some viewers of the video might be surprised to learn that inmates at Angola, once cleared by the prison doctor, can be forced to work under threat of punishment as severe as solitary confinement. Legally, this labor may be totally uncompensated; more typically inmates are paid meagerly—as little as two cents per hour—for their full-time work in the fields, manufacturing warehouses, or kitchens. How is this legal? Didn’t the Thirteenth Amendment abolish all forms of slavery and involuntary servitude in this country? Not quite. In the shining promise of freedom that was the Thirteenth Amendment, a sharp exception was carved out.”); Robert Carr, Memorandum to the President’s Committee on Civil Rights, “The Negro in the United States,” prepared by Milton Stewart and Herbert Kaufman, June 24, 1947, Box 37, Nash Papers, HSTL (“Since the police and the courts stand behind any practices which preserve white dominance, the white population, acting individually or in groups, has not hesitated to make extensive use of violence and intimidation.”); WASKOW, *supra* note 68, at 10; NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 12 (2014); ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* 179 (1998); *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

253. Stephens II, *supra* note 45 (“The protestors in Ferguson aren’t irrational or apolitical. They are calling attention to their basic, unmet needs.”); MAYA ANGELOU, *LETTER TO MY DAUGHTER* 103 (2008) (“I am never proud to participate in violence, yet I know that each of us must care enough for ourselves that we can be ready and able to come to our defense when and wherever needed.”); Sciallo, *supra* note 55, at 1406–07 (“Trayvon Martin haunts us. Michael Brown haunts us. Eric Garner haunts us. What haunts us more is the specter of white supremacy that enabled these tragic events.”).

254. Erwin Chemerinsky, *The Fire This Time*, 66 S. CALIF. L. REV. 1571, 1572 (1993) (“When people come to believe that a system offers them nothing, they have nothing to lose by burning it down.”); *We the Protesters*, WE THE PROTESTERS (Jan. 15, 2015), <http://www.wetheprotesters.org> (“We, the protesters of Ferguson and beyond, in order to fulfill the democratic promise of our union, establish true and lasting justice, accord dignity and standing to everyone, center the humanity of oppressed people, promote the brightest future for our children, and secure the blessings of freedom for all black lives, do ordain and dedicate ourselves to this movement of radical liberation.”).

note offer important avenues for change and for decreasing police officers’ use of excessive force. Nonetheless, these reforms are only one piece of a larger struggle against colorblindness, post-racialism, and Equal Protection jurisprudence that limit the means for addressing contemporary racism.<sup>255</sup> As the issue of policing enters the mainstream political conversation leading up to the 2016 presidential election, *actual* change will require not only a conversation about specific, small reforms but also a broader conversation about racism, policing, and the criminal justice system as a whole.<sup>256</sup>

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255. Matt Pearce, *Activists Come Up with Plan To End Police Killings. Here It Is*, L.A. TIMES (Aug. 21, 2015), <http://www.latimes.com/nation/la-na-police-campaign-zero-20150821-story.html>; Adia Harvey Wingfield, *Color-Blindness is Counterproductive*, THE ATLANTIC (Sept. 13, 2015), [http://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/?utm\\_source=SFFB](http://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/?utm_source=SFFB) (“After all, the dominant language around racial issues today is typically one of colorblindness, as it’s often meant to convey distaste for racial practices and attitudes common in an earlier era . . . . Many sociologists, though, are extremely critical of colorblindness as an ideology. They argue that as the mechanisms that reproduce racial inequality have become more covert and obscure than they were during the era of open, legal segregation, the language of explicit racism has given way to a discourse of colorblindness. But they fear that the refusal to take public note of race actually allows people to ignore manifestations of persistent discrimination.”).

256. Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward A Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 122 (2015) (“‘Social progress,’ as this growing movement defines it, is not limited to incremental reforms within deeply flawed institutions such as law enforcement and prisons, but rather encompasses transformative solutions to dramatically shift how our society ensures public safety for all and move towards addressing societal ills with significant input from and investment in communities.”); Sam Frizell, *#BlackLivesMatter Is Winning the 2016 Democratic Primary*, TIME (July 23, 2015), <http://time.com/3969053/blacklivesmatter-black-lives-matter-bernie-sanders/>.

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